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CLARIFICATION OF AUTHORITIES AND RESPONSIBILITIES FOR IDENTIFYING AND PROTECTING CULTURAL RESOURCES ON THE OUTER CONTINENTAL SHELF*

M-36928 *November 24, 1980*

Outer Continental Shelf Lands Act: Generally

Apart from control over authorizations to exploit the mineral resources of the OCS, the Department has no authority to regulate activities affecting mineral resources on the OCS.

National Historic Preservation Act: Generally

Sec. 106 of the National Historic Preservation Act places a duty upon the Department to insure that issuance of authorizations on the OCS will not affect significant cultural resources without providing the Advisory Council on Historic Preservation the opportunity to comment. A rule of reason applies to the extent of the OCS lands to be studied and the degree of effort required.

National Historic Preservation Act: Generally

Archival research is first required to determine whether significant cultural resources may be affected by activities on an OCS lease or right-of-way.

National Historic Preservation Act: Generally

Cultural resource surveys should only be undertaken when the results of archival research indicate the likelihood that a significant cultural resource will be affected by the undertaking and that the resource is capable of being detected at a reasonable cost and effort.

*Not in chronological order.

National Historic Preservation Act: Generally

When cultural resources are identified on the OCS, it is appropriate to consider them for nomination to the National Register of Historic Places.

National Historic Preservation Act: Generally

Sec. 106 of the National Historic Preservation Act authorizes the Department to require either by regulation or by stipulation in an OCS lease or right-of-way that the lessee or holder make cultural resource studies where evidence indicates that such resources may be affected by operations, and that information discovered be made available to the Department.

Outer Continental Shelf Lands Act: Generally—National Historic Preservation Act: Generally—National Environmental Policy Act of 1969: Generally

The National Historic Preservation Act, Outer Continental Shelf Lands Act and National Environmental Policy Act authorize a stipulation which provides that a cultural resource included on or eligible for inclusion on the National Register which is discovered by an OCS lessee as a result of lease operations and which is salvaged, be made reasonably available to recognized scientific or educational institutions for study.

National Historic Preservation Act: Generally

The Outer Continental Shelf is not within the jurisdiction of a State Historic Preservation Office (SHPO). However, as a matter of comity, the recommendations of a SHPO as to OCS cultural resources should be carefully considered.

To: Director, Bureau of Land Management Director, Geological Survey
From: Solicitor
Subject: Clarification of Authorities and Responsibilities for Identifying and Protecting Cultural Resources on the Outer Continental Shelf

This memorandum is in response to your joint request dated May 2, 1980, for an option clarifying the authorities and responsibilities of your agencies for identifying and protecting cultural resources on the Outer Continental Shelf (OCS).

I. The Responsibilities of BLM and the USGS Toward Cultural Resources on the OCS are Limited to Impacts of Mineral Activities

Recent case law has demonstrated that apart from control over authorizations to exploit the mineral resources of the OCS, the Department has no authority to regulate activities affecting cultural resources on the OCS. In *Treasure Salvors* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330 (5th Cir. 1978), the court of appeals held that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq.*, extended the sovereignty of the United States to exploitation of the mineral resources of the OCS, but not for other purposes. This limited construction is consistent with Article 2 of the Convention on the Continental Shelf.[1] *See United States* v. *Ray*, 423 F. 2d 16 (5th Cir. 1970). Article 2 reads in part as follows:

> The Coastal state [nation] exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.[2]

The court noted that interpretations of the Convention by legal scholars reached similar conclusions over the nature of control of a coastal nation over its continental shelf and quoted the following comments of the International Law Commission:

> [The Commission] was unwilling to accept the sovereignty of the coastal State over the seabed and subsoil of the continental shelf. * * * [T]he text as now adopted leaves no doubt that the rights conferred upon the coastal state cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf.
>
> * * * * *
>
> It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil. 11 U.S. GAOR, Supp. 9 at 42, U.N. Doc. A/3159 (1956) (footnotes omitted), cited in 569 F. 2d at 340.

Accordingly, the court concluded that the United States did not have control over the wreck in question. Similarly, in *United States* v. *Alexander*, 602 F. 2d 1228 (5th Cir. 1979), the court of appeals held that OCSLA did not give the Secretary of the Interior authority

[1] Convention on the Continental Shelf, *done* Apr. 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, in force June 10, 1964.

[2] Natural resources are defined in Article 2 as "the mineral and other non-living resources of seabed and subsoil together with living organisms belonging to sedentary species."

to promulgate conservation measures regulating activities on the OCS having nothing to do with mineral leases. There the court struck down a conviction for damaging a coral reef where the defendant was conducting salvage operations on a sunken wreck.

These cases establish that the Department lacks the power to protect the cultural resources of the OCS by regulation of private individuals apart from any involvement with mineral activities authorized by OCSLA. Accordingly, no regulatory program for long term protection of cultural resources on the OCS can be established independent from activities necessary to insure that mineral activities do not damage these resources.[3]

In this regard, we have examined the cultural resource responsibilities of BLM and USGS set forth, in the Departmental Manual, 655 D.M. 1 (Sept. 29, 1980), and have examined the current regulations appearing at 43 CFR Part 3300 and 30 CFR Part 250. Since the responsibilities created by the manual and regulations arise out of the regulation of mineral resources on the OCS, they are a proper exercise of Secretarial authority. We do not believe that there is any legal requirement to expand them further.

II. The Requirements of Section 106 of the National Historic Preservation Act Apply to Issuance of Mineral Leases and Pipeline Rights-of-Way on the OCS.

Your memorandum specifically raises the question of the applicability of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.* (1976), to activities conducted by your agencies on the OCS.

Sec. 106 on NHPA reads as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and *the head of any Federal department* or independent agency *having authority to license any undertaking shall*, prior to the approval of the expenditure of any Federal funds on the undertaking or *prior to the issuance of any license*, as the case may be, *take into account the effect of the undertaking* on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470m of this title a reasonable opportunity to

[3] However, we are of the view that the Secretary may establish programs that assist in the preservation of cultural or natural resources on the OCS where authorized to do so and where the program does not involve the regulation of private activities apart from mineral development. For example, the Secretary is authorized to list OCS properties on the National Register of Historic Places pursuant to the National Historical Preservation Act of 1966, 16 U.S.C. 470 *et seq.* (1976), and is authorized to designate National Historic and National Natural Landmarks on the OCS pursuant to the Historic Sites Act of 1935, 16 U.S.C. 461 (1976). These programs place no restraints on private activities but only require planning considerations on the part of federal agencies when taking actions which may affect designated sites.

comment with regard to such undertaking. 16 U.S.C. § 470f (1976) (Italics added).

The Secretary of the Interior is clearly the head of a federal department having authority to issue OCS leases or rights-of-way, and issuance of an oil and gas lease or pipeline right-of-way on the OCS clearly fits the definition of "undertaking" as defined by the Advisory Council on Historic Preservation:

> "Undertaking" means any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance, or support of any non-federal action, activity, or program. 36 CFR 800.2(c) (1979).

Furthermore, it is the position of this Department that a cultural resource on the OCS may be "included in or eligible for inclusion in the National Register" because there is no provision in NHPA limiting its applicability to the proprietary or territorial jurisdiction of the United States. Section 101 (a) of NHPA states that the Secretary of the Interior is authorized to include on the National Register any site or object which is significant in American history, architecture, archeology, and culture, 16 U.S.C. § 470a(a) (1976).

Therefore, sec. 106 of NHPA places a duty upon the Department to insure that issuance of authorizations on the OCS will not affect significant cultural resources without providing the Advisory Council the opportunity to comment. Since the Department's authority to issue leases or rights-of-way extends to the geographic limits of the OCS, 43 U.S.C.A. § 1331(a) (1980 Supp.), its duties under NHPA extend to those limits.[4]

Sec. 106 has been implemented by the Advisory Council on Historic Preservation through regulations which are binding on all federal agencies in the absence of counterpart regulations promulgated under 36 CFR 800.11. The regulations implementing sec. 106 require:

> **[E]ach Federal agency to identify or cause to be identified any National Register or eligible property that is located *within the area of the undertaking's potential environmental impact and that may be affected by the undertaking.* 36 CFR 800.4(a) (1979) (Italics added).**

This statement defines the area within which the identification and other requirements of sec. 106 must be met. *See* 36 CFR 800.4(a) and (b). It is clear from the foregoing that two conditions must exist before sec. 106 duties apply: that the National Register or eligible prop-

[4] In addition to sec. 106 of NHPA, the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (1976) (NEPA), imposes an obligation upon the Department regarding cultural resources. Sec. 101(b) of NEPA provides in part:

"[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal Plans * * * to the end that the Nation may * * * (4) Preserve important historic, [and] cultural * * * aspects of our national heritage." 42 U.S.C. § 4331(b) (1976).

Regulations implementing NEPA issued by the Council on Environmental Quality require discussion of the effects upon historic and archeological resources in environmental impact statements (EIS's). 40 CFR 1502.16(g) (1979). The regulations also require that to "the fullest extent possible" EIS's be integrated with other required analyses including those under NHPA. 40 CFR 1501.7(a)(6) and 1502.25(1979).

erty be within the area of the potential environmental impact *and* that it may be affected by the undertaking.

The question then becomes the extent of the area subject to sec. 106 procedures for the undertaking's potential environmental impact, defined as follows:

> "Area of the undertaking's potential environmental impact" means that geographic area within which *direct and indirect effects generated by the undertaking could reasonably be expected to occur.* 36 CFR 800.2(o) (1979) (Italics added).

Therefore, the "area of the undertaking's potential environmental impact," as defined, determines the extent of the OCS where sec. 106 responsibilities may arise. The regulations limit the effects to be studied to those which "could reasonably be expected to occur" as a result of the federal action. 36 CFR 800.2(o). Thus the regulations explicitly adopt a rule of reason, which requires that only reasonably foreseeable effects be studied for potential impact on cultural resources.

In the OCS context, we believe the rule of reason first requires archival research to determine whether significant known cultural resources may be affected by activities on a lease or right-of-way. This research includes an examination of the published lists of the National Register and eligible properties, available literature, public records, and advice from individuals or organizations with historical and cultural expertise, as appropriate, to determine whether historic and cultural properties are known or likely to exist that may be affected by OCS activities.

After completion of the research, further decisions as to the type of site-specific cultural resources surveys, if any, should be made. Generally, these surveys should be only undertaken when the results of archival research indicate the likelihood that a significant cultural resource will be affected by the undertaking and that the resource is capable of being detected at a reasonable cost and effort. For example, if research indicates that a significant shipwreck is likely to exist on a certain lease tract or adjacent lease tracts and that it can be detected, reasonable survey efforts to assure that mineral activities will not disturb the shipwreck should be undertaken.

Difficulty exists with anomalies which may indicate the presence of a cultural resource when further surveys or studies to determine their true character are prohibitively expensive. Under these circumstances, we believe that it would not exceed the Department's authority under OSCLA and that it would be consistent with its cultural resource responsibilities to include stipulations in a lease or right-of-way to insure avoidance of any

adverse impact upon an anomaly. The identification and consultation requirements of sec. 106 are only triggered when the federally authorized activity will have an effect upon a cultural resource. *See* 16 U.S.C. § 470f (1976). Avoidance under these circumstances eliminates any effect and therefore the requirements.

Where anomalies which may be cultural resources are discovered through environmental or geological and geophysical studies of OCS tracts, either by the government or by lessees, further steps should be taken to identify them if they may be affected by operations on a lease or right-of-way. For example, cultural resources that no archival research could identify may be identified in other studies which are currently conducted on a site-specific basis for bottom-founded structures.

Finally, we feel that the rule of reason approach precludes a responsibility to physically survey lease tracts or rights-of-way for cultural resources not identified as described above. To carry out a detailed seabed survey on the premise that a cultural resource might exist, unsupported by clear historical or scientific evidence would in our opinion constitute an unjustifiable expenditure of time and resources. Conversely, if clear evidence is provided by historians, archeologists, or scientists to the effect that an historically important underwater site might suffer damage from drilling or other form of seabed exploitation, then the site should be subjected to a survey prior to the commencement of any activities that could adversely affect it or the resource should be avoided entirely.

In cases where eligible sites are identified, it should then be determined if proposed activities will affect the sites and whether that effect will be adverse. If there is no adverse effect expected, this finding should be forwarded to the Advisory Council for its concurrence. If adverse effects are expected, a report should be forwarded to the Advisory Council, for its comments. Depending on the response of the Advisory Council, treatment of the sites may be resolved by a Memorandum of Agreement with the Council staff or may require full consideration by the Advisory Council. In any event, once the Council comments have been reviewed and considered, the activities may proceed in accordance with any mitigation measures adopted. The procedures set forth in this paragraph summarize the applicable regulatory requirements found in 36 CFR Part 800 and which are to be followed in the process.

The rule of reason provides the agency decisionmaker with the opportunity to exercise judgment in complying with the NHPA and the regulations. In exercising this judgment, sensitivity to the significance of the cultural resource, possible adverse effects, mitigation options, costs to the Government or industry, and practical alternatives is required.

In accordance with NHPA, when significant cultural resources are identified, it is appropriate to consider them for nomination to the National Register of Historic Places. The shipwrecks *San Jose*, *H. L. Hunley*, *U.S.S. Peterhoff*, *U.S.S. Monitor*, and *U.S.S. Hatteras* are examples of cultural resources discovered offshore which are on, or have been identified as eligible for, the National Register. As described in Part I of this opinion, however, there is no authority over the OCS requiring identification of cultural resources apart from those affected by mineral activities. This limits the application of secs. 2 and 3 of Executive Order 11593 (May 13, 1971) to OCS cultural resources affected by mineral activities.

We recognize that the Advisory Council's regulations did not contemplate the kinds of problems associated with identification of cultural resources on the OCS. We also recognize the difficulties of outlining appropriate procedures in a legal opinion. For these reasons, we point out that the Advisory Council has invited all affected federal agencies to issue counterpart regulations more specifically defining the duties of an agency under sec. 106. 36 CFR 800.11. We strongly recommend that this procedure be followed as promptly as possible by USGS and BLM to reflect their respective responsibilities. It is through this process that we believe the rule of reason can most appropriately be defined.

III. *Authority to Require Collection of Cultural Resource Information*

You also ask whether the Department has the authority to require a lessee to collect information to identify cultural resources on the OCS throughout various stages of development. The Department has the authority to require, either by regulation or by stipulation in a lease or right-of-way, that the lessee or holder make cultural resource studies where evidence indicates that such resources may be affected by operations, and that pertinent information discovered during operations be made available to the Department. The authority is sec. 106 of NHPA which places a duty upon the Department to identify cultural resources so affected and to consider such information in authorizing development and production operations. However, the rule of reason applies. In an area where there is no information suggesting the existence of cultural resources or where a lessee chooses to avoid such resources, a requirement to conduct studies may be unreasonable. On the other hand, where historical or scientific data indicates the presence of resources that will be affected by operations, such studies can be required without being so restrictive as to effect a *pro tanto* cancellation of the lease or right-of-way. *See*

Union Oil Co. of California v. *Morton*, 512 F. 2d 743, 751 (9th Cir. 1975).

In some instances, it may be necessary to salvage certain cultural resources where impacts of exploration, development or production operations cannot be avoided. You have asked the question to whom do these resources belong under these circumstances.

The courts have made clear that the provisions of the Antiquities Act, 16 U.S.C. §§ 431–33 (1976), do not apply to objects located on the OCS. *See Treasure Salvors*, *supra*. There is, therefore, no statutory law as to how such cultural resources are to be handled when salvage is necessary. In determining title to property found upon the OCS, courts have applied the common law principle of the law of finds. *Treasure Salvors*, *supra*, at 336–337. Under this principle, title vests in "the first finder lawfully and fairly appropriating it and reducing it to possession, with the intention to become its owner." *Rickard* v. *Pringle*, 293 F. Supp. 981, 984 (E.D.N.Y. 1968). Absent an agreement to the contrary, resources salvaged by an oil or gas lessee would belong to that lessee. We believe, however, that authority exists under NHPA, NEPA and OSCLA to require a stipulation which provides that a cultural resource included on or eligible for inclusion on the National Register which is encountered or discovered by the lessee as a result of lease operations and which is salvaged, be made reasonably available to recognized scientific or educational institutions for study.

IV. *The Role of a State Historic Preservation Officer on the OCS*

Finally, the question has been independently raised of the role that a State Historic Preservation Officer (SHPO) plays regarding cultural resources on the OCS. A SHPO is defined as follows:

> "The State Historic Preservation Officer" means the official, who is responsible for administering the Act within the State or jurisdiction, or a designated representative authorized to act for the State Historic Preservation Officer. These officers are appointed pursuant to 36 CFR 61.2 by the Governors of the 50 States, Guam, American Samoa, the Commonwealth of Puerto Rico, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Mariana Islands, and the Mayor of the District of Columbia. 36 CFR 800.3(m).

A SHPO's responsibilities are defined, in part, as follows:

> The State Historic Preservation Officer should participate in the review process established by these regulations whenever it concerns an undertaking located within the State Historic Preservation Officer's jurisdiction. 36 CFR 800.5(a).

A problem arises in that the OCS is not within the jurisdiction of any state or other jurisdictional unit set forth above. As stated earlier, cultural resource regulations appearing at 36 CFR Part 800 did not contemplate problems involving the OCS. This is another example. Again, we feel that counterpart regulations are the appropriate tool to define more accurately the respective roles of the Department and SHPO's in the OCS context.

As interim advice, however, we feel that the SHPO should initially be consulted under 36 CFR 800.4(a)(1) to determine the information which may be available concerning OCS cultural resources within the area of a project's potential environmental impact. This is consistent with the duty to first attempt to identify cultural resources by archival research as set forth above. Consultation should then continue throughout the process provided in the Advisory Council's regulations. With respect to effects upon cultural resources, the regulations do not require that the recommendations of a SHPO must necessarily be followed. Nevertheless, as a matter of comity, the recommendations of a SHPO should be carefully considered.

We hope that this memorandum has provided you with guidance in this difficult area. If you have further questions do not hesitate to contact this office.

CLYDE O. MARTZ
Solicitor

ESTATE OF JESSE J. JAMES

8 IBIA 205

Decided *December 8, 1980*

Escheat determination concerning trust property on the public domain.

1. Indian Probate: Escheat

The Act of Nov. 24, 1942, 56 Stat. 1022 (25 U.S.C. § 373b (1976)) is not ambiguous. It plainly states that where, as here, a public domain allotment exceeding a value of $2,000 lies adjacent to an Indian community and may be advantageously used for Indian purposes, such allotment shall be held in trust by the United States for such Indians as Congress (not the Secretary of the Interior) may designate, where the owner of the allotment dies intestate without heirs eligible to inherit such allotment.

APPEARANCES: Craig J. Dorsay, Esq., Portland, Oregon, and Sande Schmidt, Esq., Burns, Oregon, for petitioner Burns-Paiute Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Jesse J. James, deceased Burns-Paiute, died intestate without heirs on Jan. 12, 1978, possessed of trust property located on the public domain. The estimated value of decedent's public domain allotment (Indian Joe Allotment No. 144–111) was $9,600 as of Mar. 27, 1979.

The Burns-Paiute Tribe, through counsel, seeks an order from the Board of Indian Appeals, on behalf of the Secretary of the Interior, declaring that decedent's trust property be held in trust by the United States for the benefit of the tribe by operation of escheat. According to the tribe, the Indian Joe allotment lies within the original boundaries of the Malheur Reservation and only 12 miles from present tribal land. The Burns-Paiute Tribe submits that acquisition of

the Indian Joe allotment will enhance the economic status of the tribe which is land poor.

Congress enacted a statute in 1942 to govern situations such as the above. The Act of Nov. 24, 1942, 56 Stat. 1022, codified at 25 U.S.C. § 373b (1976), provides as follows:

> If an Indian found to have died intestate without heirs was the holder of a restricted allotment or homestead or interest therein on the public domain, the land or interest therein and all accumulated rents, issues, and profits therefrom shall escheat to the United States, subject to all valid existing agricultural, surface, and mineral leases and the rights of any person thereunder, and the land shall become part of the public domain subject to the payment of such creditors' claims as the Secretary of the Interior may find proper to be paid from the cash on hand or income accruing to said estate; *Provided*, That if the Secretary determines that the land involved lies within or adjacent to an Indian community and may be advantageously used for Indian purposes, the land or interest therein shall escheat to the United States to be held in trust for such needy Indians as the Secretary of the Interior may designate, where the value of the estate does not exceed $2,000, and in case of estates exceeding said sum, such estates shall be held in trust by the United States for such Indians as the Congress may on and after November 24, 1942 designate, subject to all valid existing agricultural, surface, and mineral leases and the rights of any person thereunder.

The tribe submits that the above statute is ambiguous. Accordingly, it seeks to prove by reference to the legislative history of the Act that the Secretary is vested with authority to decree that the public domain allotment in question escheat to the Burns-Paiute Tribe as the appropriate disposition of the land. Under traditional canons of interpretation, the legislative history of a statute is irrelevant if the statute is unambiguous. *United Air Lines* v. *McMann*, 434 U.S. 192, 199 (1977).

[1] The Board does not agree with the tribe that the Act of Nov. 24, 1942, is ambiguous. The statute plainly states that a public domain allotment, lying within or adjacent to an Indian community and which may be advantageously used for Indian purposes, shall be held in trust by the United States for such needy Indians as *the Secretary of the Interior* may designate, where the value of the estate does not exceed $2,000 and where the owner of the allotment dies intestate without heirs eligible to inherit such allotment. As pertinent to the case at bar, the statute provides that a public domain allotment exceeding the value of $2,000 lying within or adjacent to an Indian community and which may be advantageously used for Indian purposes shall be held in trust by the United States for such Indians as *Congress* may designate, if the owner of the allotment dies without heirs eligible to inherit such allotment. In short, under the factual circumstances of the case at hand, it is for Congress and not the Secretary to decide whether or not the Indian Joe allotment should escheat to the Burns-Paiute Tribe or other Indians.

Based on the record before the

Board, and following a full opportunity for individual Indians and Indian groups to state a claim to the property at issue, the Board has no reservation stating that were it within its authority to decree, it would allow the Indian Joe allotment to go to the Burns-Paiute Tribe, rather than reverting to the public domain or being conveyed to other Indians.

Pursuant to the authority delegated to the Board of Indian Appeals by 43 CFR 4.1, and in accordance with the provisions of 25 U.S.C. § 373b (1976) and 43 CFR 4.205(b), the Bureau of Indian Affairs is instructed to hold the estate of Jesse J. James in trust for such Indians as Congress may hereafter designate.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

FRANKLIN ARNESS
Administrative Judge

NORTHWAY NATIVES, INC.

5 ANCAB 123

Decided *December 12, 1980*

Appeal from the Decision of the Alaska State Director, Bureau of Land Management F-14912-A and F-14912-B.

Dismissed in part; motion to intervene denied.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Dismissal

Where one issue on appeal is that the Bureau of Land Management erred by excluding certain lands from conveyance without adjudicating the status of such lands, and the appellant and the Bureau of Land Management stipulate to withdrawal of the appeal on condition that the Bureau of Land Management will later adjudicate the status of such lands, then the issue is resolved and the Board will order partial dismissal of the appeal as to that issue.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Intervention

Intervention in proceedings before the Alaska Native Claims Appeal Board is in the discretion of the Board. 43 CFR 4.909(b).

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Intervention

The Board will not allow intervention following resolution of the issues on appeal.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Intervention

The Board will not allow introduction of new issues to an appeal by an intervenor.

APPEARANCES: Peter J. Aschenbrenner, Esq., Aschenbrenner and Savell, and David Wolf, Esq., Keane, Harper, Pearlman and Copeland, for appellant; Elizabeth S. Ingraham, Esq., for Doyon, Limited; M. Francis Neville, Esq., Office of the Regional Solicitor, for Bureau of Land Management; Shelley J. Higgins, Esq., and Martha T. Mills, Esq., Department of

Law, for State of Alaska; Thomas B. Jones, Esq., U.S. Army Corps of Engineers, Agent to U.S. Air Force.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

Summary of Appeal

Northway Natives, Inc., appealed the Bureau of Land Management Decision to Issue Conveyance of their land selected under ANCSA. One issue was that the Bureau of Land Management erred by excluding certain lands, PLO 5164, from conveyance without adjudicating the status of such lands.

The Bureau of Land Management and Northway Natives, Inc., stipulated to an agreement that the Bureau of Land Management will issue a decision adjudicating the status of the PLO 5164 selection at a later date. Northway Natives, Inc., then withdrew its appeal. The Board approved the stipulation pursuant to 43 CFR 4.913, and here partially dismisses the appeal as to the issue involving PLO 5164.

Subsequent to Northway Natives, Inc., withdrawing its appeal as to PLO 5164, the U.S. Air Force filed a motion claiming use of certain lands in connection with PLO 5164. The Board here finds that it will not allow intervention following resolution of the issue relating to PLO 5164 lands; neither will the Board allow an intervenor to introduce new issues after the appeal period established by 43 CFR 4.903 has expired. The U.S. Air Force's Motion to intervene is denied. This is a partial decision in the *Appeal of Northway Natives, Inc.*, ANCAB VLS 78–57; other issues in that appeal remain before the Board.

Jurisdiction

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Procedural Background

Northway Natives, Inc. (Northway), filed village selection applications F–14912–A, *as amended*, on Oct. 22, 1974, and F–14912–B, *as amended*, on Dec. 12, 1974, for lands located near the village of Northway. The applications were filed under the provisions of § 12(a) of the Alaska Native Claims Settlement Act (ANCSA), Dec. 18, 1971 (85 Stat. 688, 701; 43 U.S.C. §§ 1601, 1611(a)) (Supp. V 1975).

The Bureau of Land Management (BLM) published in 43 FR 28051 (June 28, 1978), its Decision to Issue Conveyance (DIC) of land to Northway, in response to village selection applications F–14912–A, *as amended*, and F–14912–B, *as amended*. On July 28, 1978, Northway filed an appeal alleging, *inter alia*, in its Statement of Reasons that the BLM had erred in exclud-

ing certain tracts of land from the DIC.

Since this partial decision deals with the issue relating to the exclusion of P.L.O. No. 5164, 37 FR 4713 (Mar. 4, 1972) (PLO 5164) and the U.S. Air Force's (Air Force) claim to lands purported to be used in connection with PLO 5164 lands, only that portion of item numbered V of appellant's Memorandum in Support of its Statement of Reasons dealing with PLO 5164 is referred to in this decision. The pertinent parts of items numbered V read:

V. THE BLM ERRED IN EXCLUDING FROM THE INTERIM CONVEYANCE OF JUNE 26, 1978 CERTAIN TRACTS OF LAND BECAUSE NO DETERMINATION HAS BEEN MADE BY THE SECRETARY AS TO THE SMALLEST PRACTICABLE TRACT ENCLOSING LAND ACTUALLY USED IN CONNECTION WITH THE ADMINISTRATION OF ANY FEDERAL INSTALLATION.

Under § 11(a) of the Alaska Native Claims Settlement Act public lands are withdrawn for selection; § 3(e) defines public lands as follows:

"'Public lands' means all Federal lands and interest therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land already used in connection with the Administration of any Federal installation, * * *"

The Secretary has not made these required determinations as to the Federal installations excluded from Northway's selection and listed in Northway's Motion for Segregation and Remand for Section 3(e) determination.

* * * * *

H. *PLO 5164.*

PLO 5164 dated February 28, 1972 withdrew for the Airforce [sic] five siesmic [sic] borehole sites and over thirty-three miles of interconnecting access and cable routes for a total of approximately 400 acres. No § 3(e) application has been filed, and no § 3(e) determination has been made by the Secretary on these lands. For this reason these lands should not have been excluded from selection by Northway in the DIC dated June 26, 1978. Even if the exclusion from the DIC dated June 26, 1978 of the borehole sites is determined to be proper, the interconnecting access and cable routes should not be excluded from conveyance, but rather should be reserved as easements. Since § 2650.4–7(a)(6) of the proposed easement regulations provides that reserved easements may be limited to government use, if any of the borehole sites is determined to be validly withheld from conveyance, the interconnecting access and cable route should be remanded to the BLM for review and determination under the new easement regulations when they have been finally adopted.

* * * * *

CONCLUSION

Since no proper determination has been made by the Secretary pursuant to ANCSA § 3(e) as to the smallest practicable tract enclosing land actually used in connection with federal installations listed above, this portion of this appeal should be remanded to the Bureau of Land Management for such proper determinations.

Appellant's Memorandum in Support of Statement of Reasons, at 34.

Northway and the BLM filed a joint stipulation on Apr. 23, 1979, and included, *inter alia*, the following agreement approved by Board order dated May 25, 1979:

4. The BLM and Northway agree that the BLM decision under appeal did not affect and did not purport to adjudicate the Northway selection of the following

tracts which were excluded from the description of lands to be conveyed to Northway:

* * * * *

b) PLO 5164

BLM and Northway agree that the BLM will issue decisions adjudicating the Northway selection of these tracts at a later date. *Northway therefore withdraws its appeal as to these tracts.* [Italics added.]

Northway and BLM Stipulation, at 2–3.

The Air Force filed a Motion to Intervene on Mar. 7, 1980, claiming use of the following lands in T. 15 N., R. 19 E., C.R.M., in connection with PLO 5164:

Section 20: E½SE¼
Section 28: NE¼, N½NW¼, N½S½ NW¼, N½SE¼, SE¼SE¼
Section 29: NE¼NE¼
Section 33: NE¼, N½NE¼SE¼
Contains 700.00 acres, more or less.

Air Force Motion to Intervene, Exhibit "A".

The Air Force requests the Board to remand the lands described above to the BLM for adjudication of its claim.

On Mar. 18, 1980, BLM filed a Motion to Remand those lands claimed by the Air Force. BLM states that it learned for the first time on Mar. 3, 1980, that the Air Force claims certain land, other than that withdrawn by PLO 5164, as not being public lands withdrawn for Native selection. BLM takes the position that the lands claimed by the Air Force should be remanded to the BLM in order to adjudicate the claim of the Air Force. On Mar. 27, 1980, the Board denied BLM's motion.

The Board issued a show cause order to the Air Force on Mar. 25, 1980, so that the Board could determine if the Air Force has the necessary "property interest" required by 43 CFR 4.902; and second, whether the issue raised could be considered within a Motion to Intervene, or, if in fact, it is a new appeal and therefore barred from administrative review because of lack of timeliness pursuant to 43 CFR 4.903. The order required the Air Force to show why it has standing to intervene and why the issue raised is proper for consideration in this appeal.

On the question of standing to intervene, the Air Force recites 43 CFR 4.909(b) and 4.902 and, as an agency of the Federal Government, claims standing pursuant to § 4.902 in its Response to Order to Show Cause filed on Apr. 15, 1980.

As to the question of why the issue raised is proper for consideration in this appeal, the Air Force claims use of lands described in PLO 5164 and Exhibit "A" to its Motion to Intervene, since prior to Dec. 18, 1971. The Air Force cites *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498 (1839), where the court held that use of public lands under authority of law appropriates the land used and then contends that "it is authorized to perform a classified mission at Beaver Creek and the land used is thus held under authority of law." The Air Force also contends that:

[T]he land required, in addition to that formally set forth in PLO 5164, has been

appropriated by virtue of PLO 5164 and also by authority of the Air Force to perform its mission at Beaver Creek. It follows that the Board cannot make a final decision concerning PLO 5164 without considering the land appropriated by virtue of PLO 5164. This is true regardless of any stipulation entered into by any of the parties unless the Air Force has legally concurred in that stipulation.

Air Force Response to Order to Show Cause, at 3.

The Air Force's claim that it used the lands since prior to ANCSA (Dec. 18, 1971), and its claim to such lands "under authority of law," resulted in the Board ordering, on May 23, 1980, the Air Force to file additional information as follows:

a. Submit a copy of all applications for use of land in connection with the Beaver Creek project. For classified applications pursuant to 43 CFR 2351.(a) [sic] [43 CFR 2351.2(a)] provide application number and date submitted to BLM.

b. The Air Force asserts that "it is authorized to perform a classified mission at Beaver Creek and the *land used is thus held under authority of law. Evidence of this is shown by PLO 5164.*" [Italics added.] The Air Force must be more specific as to the *authority of law* allowing use of land not withdrawn by PLO 5164.

c. Submit a copy of the document reserving use of PLO 5164 withdrawn lands during the period January 17, 1969 to February 28, 1972 (date PLO 5164 was signed), and any other lands for which the Air Force asserts authority to use.

Board's Order for Information, at 1–2.

On July 7, 1980, the Air Force filed a response to the Board's order of May 23, 1980, to the effect that:

a. PLO 5164 appears to be the only formal application for use of public lands in the Beaver Creek area. There appears to be no other application except that resulting in PLO 5164.

b. There is no document, to the Air Force's knowledge, reserving use of PLO 5164 lands during the period Jan. 17, 1969 to Feb. 28, 1972. The Air Force stresses that their claim to land is not made by way of formal written documentation.

c. The Air Force cites the court's ruling in *Wilcox* v. *Jackson*, *supra*, again for its claim to lands "under authority of law" that the function, and therefore the occupancy, at Beaver Creek was authorized by the Secretary of the Air Force.

d. The Air Force suggests the Board remand this appeal to the BLM for a 3(e) determination.

Doyon, Limited (Doyon), in responding to the Air Force on Aug. 15, 1980, disagrees with the Air Force. Doyon asserts the Board lacks jurisdiction to consider the Air Force's claim and its untimely attempt to interject new issues into this appeal.

BLM responded to Doyon on Aug. 27, 1980, as follows:

1. The Air Force has claimed that it has used the lands at issue since *prior to* December 18, 1971. See, Motion to Intervene dated March 7, 1980. If these lands were appropriated by such use, the appropriation preceded the § 11(a)(1) withdrawal and § 11(a)(1) cannot be construed as a bar to such appropriation.

2. If the pre-ANCSA use alleged by the Air Force meets the requirements of § 3(e)(1), the lands were not "public lands" and therefore were unaffected by the § 11(a)(1) withdrawal.

3. No statute, regulation or BLM policy currently requires a federal agency to submit a "§3(e) application." Therefore, there is no basis for Doyon's assertion that lands not subject to such an application cannot be remanded for a § 3(e) determination.

4. The Board clearly has jurisdiction to grant BLM's Motion to Remand as explained in BLM's Memorandum In Support Of Request For Reconsideration dated April 7, 1980.

BLM's Response to Doyon's Response to U.S. Air Force, at 1–2.

Decision

Northway's appeal as to the exclusion of PLO 5164 in the DIC and the Air Force's motion to intervene raises three issues for resolution by the Board:

a. Does Northway's conditional withdrawal of the PLO 5164 issue resolve that issue in the above-captioned appeal?

b. Does Northway's conditional withdrawal of its appeal as to the issue of PLO 5164 dispose of the issue to prohibit intervention by one not a party to the appeal at the time of withdrawal?

c. Should the Air Force, as an intervenor, be allowed to introduce new issues to the appeal?

Northway, in its statement of reasons in the above-captioned appeal alleged that the BLM had erred by excluding certain lands in the DIC because no § 3(e) determinations had been made by the Secretary. PLO 5164 is one of the land areas at issue. Northway asserts that PLO 5164 lands should not have been excluded from the DIC because no § 3(e) application had been filed and no § 3(e) determination has been made. Furthermore, Northway asserts that even if exclusion of PLO 5164 lands is determined to be proper, the interconnecting access and cable routes should not be excluded from conveyance, but rather should be reserved as easements.

Northway withdrew its appeal on the issue of PLO 5164 based on the conditional agreement with the BLM that the BLM will issue a decision adjudicating Northway's selection of PLO 5164 at a later date.

[1] 43 CFR 4.913(b) provides for Board approval of agreements of the type entered into between the BLM and Northway by stipulation on Apr. 23, 1979, and approved by the Board on May 25, 1979. Northway's withdrawal resolves the issue involving PLO 5164. Where one issue on appeal is that BLM erred by excluding certain lands from conveyance without adjudicating the status of such lands, and the appellant and BLM stipulate to withdrawal of the appeal on condition that BLM will later adjudicate the status of such lands, then the issue is resolved and the Board will order partial dismissal of the appeal as to that issue.

The Air Force's description of lands it claims to have used in connection with PLO 5164 incorporates lands withdrawn by PLO 5164 as well as lands in the immediate vicinity. The Air Force's Motion to Intervene addresses two classes of land:

(1) Lands withdrawn by PLO 5164, excluded in the DIC and subsequently appealed by Northway.

(2) Lands selected by Northway and approved for conveyance without being appealed during the appeal period allowed by 43 CFR 4.903.

The Board, in *Appeal of Bristol Bay Native Corp.*, 4 ANCAB 222, 228, 87 I.D. 164, 167 (1980) [VLS 80–2], discusses intervention:

> Intervention in proceedings before the Board is provided for by 43 CFR 4.909 (b), which states, "Any person may petition the Board to intervene in an appeal. Upon a proper showing of interest under § 4.902, such person may be recognized as an intervenor in the appeal." Other than requiring service upon all parties of any motion to intervene and the filing with the Board of a certificate of service, 43 CFR 4.909(d), the regulations are void of any further requirements or guidelines regarding intervention.

The Board adopts the rulings made in *Appeal of Bristol Bay Native Corp., supra*, in disposing of the Air Force's motion with respect to PLO 5164 lands.

[2, 3] The provision of 43 CFR 4.909(b) stating that a petitioner "may be recognized as an intervenor" bestows on the Board discretion as to whether to allow intervention. In the discretion vested in the Board with regard to intervention, the Board hereby rules that it will not allow intervention following resolution of the issues on appeal.

As to lands the Air Force claims it used in conjunction with PLO 5164 lands, the DIC approved these lands for conveyance and no one appealed the decision of the BLM as to such lands during the appeal period. Therefore, the Board finds the motion of the Air Force to intervene as to these lands not appealed introduces a new issue to the appeal after the appeal period expired.

[4] In the discretion vested in the Board with regard to intervention, the Board will not allow introduction of new issues to an appeal by an intervenor.

Based on the above findings, conclusions and ruling, the motion of the Air Force to intervene in the above-captioned appeal is hereby Ordered denied.

As a result of dismissal of this appeal as to issues involving the exclusion of PLO 5164, and denial of the Air Force's Motion to Intervene, the lands associated with those matters are no longer affected by any issue on appeal. Therefore, in keeping with the Board's policy of segregating lands unaffected by issues on appeal, the following lands are segregated from the remaining lands in dispute and remanded to BLM:

T. 15 N. 19 E. Copper River Meridian

Section 20: E½SE¼
Section 28, excluding PLO 5164 lands and other lands already excluded in the DIC here appealed: NE¼, N½NW¼, N½S½NW¼, N½SE¼, SE¼SE¼
Section 29: NE¼NE¼
Section 33: NE¼, N½NE¼SE¼
Containing 700.00 acres, more or less.

Conveyance of these lands should not be delayed pending resolution of the remaining issues on appeal.

336-182 O - 81 - 2

Based on the foregoing findings and rulings, the Board finds it unnecessary to rule on BLM's Motion for Reconsideration.

JUDITH M. BRADY
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

LITE SABIN

51 IBLA 226

Decided *December 15, 1980*

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting oil and gas lease offer NM 38277.

Reversed and remanded.

1. Administrative Procedures: Generally—Rules of Practice: Generally—Notice: Generally

Any document which is sent by certified mail to an individual at his record address is considered to have been served at the time of return by the post office of the undelivered certified letter, such constructive service being equivalent in legal effect to actual service of the document.

APPEARANCES: Craig R. Carver, Esq., Head, Moye, Carver & Ray, Denver, Colorado, and James W. McDade, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This appeal is from a decision dated July 22, 1980, by the New Mexico State Office, Bureau of Land Management (BLM), rejecting appellant's oil and gas lease offer NM 38277.

The offer, filed for Parcel No. 1122, was first drawn at the public drawing held in the State Office on Sept. 11, 1979.

The decision rejected the offer on the ground that appellant had failed to timely file a "Certification of Qualifications to Hold a Federal Oil and Gas Lease."

On May 22, 1980, BLM mailed appellant's certification via certified mail "restricted delivery" to her address of record, 115 South LaSalle, Chicago, Illinois. This is the address of Stewart Capital Corporation (Stewart), appellant's filing service.

With her statement of reasons appellant has included the affidavit of one of Stewart's employees. The affidavit states that the envelope bearing the certification was received by Stewart on May 28, 1980, appellant's permanent address was written thereon by Stewart, and it was forwarded to appellant. However, the post office attempted a second delivery of the envelope to the South LaSalle street address on Saturday, May 31, 1980, when Stewart's offices were closed. Affixed to the envelope are stickers marked "05/31/80, Return to Sender, Not Deliverable as Addressed, Unable to Forward." Appellant's permanent address has been crossed out by heavy black crayon. The envelope was returned to the New Mexico State Office on June 9, 1980.

The affidavit asserts that the New Mexico State Office routinely mails the correspondence of its clients to the South LaSalle street address via restricted delivery. The affidavit explains Stewart's procedure for handling such correspondence:

> Unable to sign for such documents, Stewart Capital Corporation has determined that it should have these documents forwarded to the client at his/her permanent address. Consequently, the envelopes so marked which are received by Stewart Capital Corporation are marked "Please Forward" and the client's permanent address is affixed. A copy of the envelope is taken to verify the forwarding request and the envelope, unopened, is given back to the postman for further handling. Stewart Capital Corporation then immediately notifies the client to expect the envelope and requests that the client advise it as to the contents of the envelope so that it can advise the client as to the proper method of complying with the BLM's request. If Stewart Capital Corporation has received no response to this letter from the client within a week or so, it contacts the client to see if the letter has, in fact, been received by the client. If not, steps are then taken to obtain a copy of the contents of the envelope directly from the Bureau of Land Management office from which it originated.

With respect to the envelope here at issue the affidavit states that a

> restricted delivery letter from the New Mexico office of the Bureau of Land Management was received by Stewart Capital Corporation and forwarded to Lite Sabin per established procedure on May 28, 1980. Mrs. Sabin was immediately notified of this fact and she advised Stewart Capital Corporation June 19, 1980, that she had still not received it. At that point, Stewart Capital's legal counsel took steps to obtain a copy of the documents involved, which turned out to be a Certification of Qualifications to hold a Federal Oil and Gas Lease. These copies were forwarded to Mrs. Sabin for action. It was ascertained at that time that the forwarding request applied to the envelope by Stewart Capital Corporation had been obliterated by the Post Office at its own discretion and that the envelope had been returned to the New Mexico office of the BLM as unforwardable on June 9, 1980. Believing that Mrs. Sabin would be allowed thirty days from the date of the return of the envelope to the point of its origin within which to reply, our legal counsel advised that she should submit the documents requested no later than July 8, 1980. Mrs. Sabin signed the documents and forwarded them to the BLM on July 2, 1980, and they were received by the BLM, per its decision dated July 22, 1980, on July 7, 1980.

Appellant contends that 43 CFR 1810–2(b) [1] does not allow a presumption of receipt of a BLM document to arise where the actions of the New Mexico State Office precluded [2] receipt. Appellant contends that BLM failed to comply

[1] 43 CFR 1810.2(b) provides:

"Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where the attempt to deliver is substantiated by post office authorities."

[2] Appellant's posture is not without logic. If appellant had gone to Europe for 6 months and had left an agent fully authorized to act on her behalf and BLM had sent a communication by "restricted delivery," it is obvious that appellant would not have received notice within which timely action could have been taken. It is not apparent from the record what useful purpose, if any, was sought to be served by the use of "restricted delivery."

with this regulation because it mailed the certification in a manner in which it could not be accepted by appellant's agent at appellant's address of record. Restricted delivery, appellant argues, defeated due process and notice which are policies of the regulation.

Appellant further contends that in any case, the completed certification was timely received by BLM.[3]

[1] We need not discuss the issue whether BLM complied with the cited regulation because we agree with appellant that her completed certification was timely received by BLM. In *James W. Heyer*, 2 IBLA 318 (1971), the Board stated:

> A document which is sent by certified mail to an individual at his record address is considered to have been served at the time of return by the post office of the undelivered, certified letter, such constructive service being equivalent in legal effect to actual service of the document.

This principle is stated also in 43 CFR 4.401(c)(3).

We conclude that BLM incorrectly considered the 30-day period as running from May 31, 1980. According to the above authorities, that period began to run as of June 9, 1980, when the undeliverable certification was returned to BLM. Thus, appellant had until July 9, 1980, to file her certification. Since the document was filed on July 7, the lease offer was improperly rejected for untimely filing of the certification.

[3] The appellant also suggests that the information sought by BLM was already present in the record. The record does contain a second copy of the certification. That copy, however, is not executed or signed by appellant.

Our holding herein is not inconsistent with that reached in *Brooks Griggs*, 51 IBLA 232, 87 I.D. 612 (1980), also decided this date. The cases are distinguishable on their facts, in that in *Griggs*, we found that the certification was not delivered by the postal service to the offeror's address of record, whereas in the instant case it was.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and BLM is instructed to issue appellant the lease, all else being regular.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

BROOKS GRIGGS

51 IBLA 232

Decided *December 15, 1980*

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting oil and gas lease offer NM-A 36164.

Set aside and remanded.

1. Notice: Generally—Oil and Gas Leases: Generally

Where BLM sends by certified mail a notice to an offeror at his record address that he must file a certificate as

to his qualification to hold an oil and gas lease, and the letter is returned to BLM marked "Not Deliverable as Addressed, Unable to Forward," and it is established that nondelivery was due to post office error, the appellant will not be considered to have received notice, and the rejection of the lease offer will be set aside.

APPEARANCES: Craig R. Carver, Esq., Head, Moye, Carver & Ray, Denver, Colorado; James W. McDade, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD LAND APPEALS

This appeal is from a decision dated July 24, 1980, by the New Mexico State Office, Bureau of Land Management (BLM), rejecting oil and gas lease offer NM–A 36164.[1]

Appellant's offer for parcel No. 464 was drawn number one at a public drawing held in the State Office on Feb. 13, 1979. The decision gives the following reason for rejecting the offer:

> Pursuant to Washington's Instruction Memorandum No. 80–492, a Certification of Qualifications to Hold a Federal Oil and Gas Lease (Simultaneous) was mailed to Ms. [*sic*] Griggs on May 20, 1980 by certified return receipt mail. The certification was mailed to Ms. Griggs' address of record, 115 South La Salle, Room 2435, Chicago, IL 60606. The certification was returned to this office marked "Not Deliverable As Addressed, Unable to Forward", on June 2, 1980.
>
> The certification states: "Please sign, complete and return to this office the enclosed certification. If the properly signed and *completed* certification is not returned within 30 days from receipt of this notice, the applicant will have failed to demonstrate qualifications to hold this oil and gas lease and the offer will be rejected." The certification was not filed in this office.
>
> Offer to lease NM–A 36164 is hereby rejected as of June 27, 1980, per our Field Solicitor's instructions to use the last date of attempted delivery in calculating the 30 days. Last attempted date of delivery was May 28, 1980. Therefore, the end of the 30-day period for compliance was June 27, 1980. (See 43 CFR 1810.2.) [Italics in original.]

BLM sent appellant's certification via certified mail No. 5606 "Restricted Delivery" to his address of record which is the address of Stewart Capital Corp. (Stewart), appellant's filing service. Quoting the Domestic Mail Manual sec. 933.1, appellant states that restricted delivery

> is a service by which a mailer may direct that delivery be made only to the addressee or to an agent of the addressee who has been specifically authorized in writing to receive his mail. This service is available only for articles addressed to natural persons specified by name.

Affixed to the envelope bearing the certification is a sticker marked "05/28/80, Return To Sender, Not Deliverable as Addressed, Unable To Forward." The envelope was returned to the New Mexico State Office and is date stamped by that office June 2, 1980.

Appellant contends that Stewart at no time received an attempt to

[1] This offer was previously before the Board in *Brooks Griggs*, 44 IBLA 185 (1979), for reasons unrelated to the present appeal.

deliver the envelope in question. With his statement of reasons, appellant has included the affidavit of one of Stewart's employees. The affidavit asserts that the New Mexico State Office routinely mails the correspondence of its clients to the South LaSalle Street address via restricted delivery. The affidavit goes on to explain Stewart's procedure for handling such correspondence:

> Unable to sign for such documents, Stewart Capital Corporation has determined that it should have these documents forwarded to the client at his/her permanent address. Consequently, the envelopes so marked which are received by Stewart Capital Corporation are marked "Please Forward" and the client's permanent address is affixed. A copy of the envelope is taken to verify the fowarding request and the envelope, unopened, is given back to the postman for further handling. Stewart Capital Corporation then immediately notifies the client to expect the envelope and requests that the client advise it as to the contents of the envelope so that it can advise the client as to the proper method of complying with the BLM's request. If Stewart Capital Corporation has received no response to this letter from the client within a week or so, it contacts the client to see if the letter has, in fact, been received by the client. If not, steps are then taken to obtain a copy of the contents of the envelope directly from the Bureau of Land Management office from which it originated.

With respect to appellant's mail, the affidavit states:

> In the case of Brooks Griggs, as regards the above referenced lease, Stewart Capital Corporation's records indicate that two restricted delivery letters addressed to Brooks Griggs were successfully forwarded to Mr. Griggs per the procedure outlined above. The first instance, occurring in February, 1980, involved a notice of rental due, and the second instance, occurring in July, 1980, involved a decision rejecting the offer to lease. There is no written record of any attempt being made by the Post Office to deliver any other restricted delivery letters to Brooks Griggs regarding this lease at Stewart Capital Corporation's Chicago office. In particular, there is no record of any attempt to deliver the restricted delivery letter during May 28, 1980, to which the July, 1980, Decision of the Bureau of Land Management refers. All employees of Stewart Capital Corporation present during that time have been questioned and none recalls such an attempt. Furthermore, a notation to the effect that such an envelope was received and what action was taken regarding it would have been made in Stewart Capital Corporation's certified letter "log".

Appellant contends that he was prevented from receiving notice because of breach of duty by the post office, that such breach of duty is imputed to the New Mexico State Office, and that under the facts of this case he cannot be considered as having received constructive notice pursuant to 43 CFR 1810.2(b), which provides:

> (b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where

the attempt to deliver is substantiated by post office authorities.

Appellant contends that BLM failed to comply with this regulation because it mailed the letter in a manner receivable only by himself. The regulation, appellant points out, requires only that a communication be mailed to a "last address of record," not the person himself. Appellant also argues that under the regulation a presumption of receipt of a document cannot arise where BLM is aware of nondelivery and fails to correspond with an applicant's attorney of record. Appellant suggests that in using restricted delivery BLM overreached itself and defeated the object of the regulation—communication by mail reasonably certain to provide notice to an applicant.

[1] The question presented for decision is whether appellant had sufficient notice to enable him to file his qualifications in connection with lease offer NM–A 36164. We think not.

43 CFR 1810.2(b) states that an offer of delivery which cannot be consummated because the addressee has moved without leaving a forwarding address, or because delivery is refused, or because no such address exists, will serve as notice where the attempt to deliver is substantiated by the post office.

As appellant has pointed out, none of these three circumstances is present in the case before us. In *Jack R. Coombs*, 28 IBLA 53 (1976), where these three circumstances were also absent, the Board held that the fault for nondelivery must rest with the Post Office. Herein, the South La Salle Street address was appellant's address of record, and Stewart, the addressee's agent, had developed a procedure for handling and forwarding BLM's restrictive service mailings to its clients. On the basis of the affidavit and appellant's uncontroverted statements its appears that no attempt was made to deliver the envelope in question on Wednesday, May 28, 1980, the date of "notice" relied on in BLM's decision. In *Joan L. Harris*, 37 IBLA 96 (1978), the Board took official notice of relevant postal service regulations incorporated by reference in 39 CFR 111.1. Those regulations require a carrier to leave notice of the certified mail if he cannot deliver the certified letter for any reason. A letter which is not deliverable is to be held at the post office. If not called for within 5 days, a second notice is to be issued. If the letter is not called for or redelivery requested, it is to be returned to the sender at the expiration of the period stated by the sender or after 15 days if no period is stated.

Had these procedures been followed in the case before us the letter obviously could not have been returned to the New Mexico State Office by Monday, June 2. On the record, it is apparent that the post office erred in its handling of this item of certified mail in that it

failed to follow its own required procedures. Since the error prevented appellant from receiving notice, BLM's rejection of his lease offer was not proper. Having disposed of the appeal on this basis, appellant's other arguments need not be discussed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from its set aside and the case is remanded to BLM.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

DOUGLAS E. HENRIQUES
Administrative Judge

BERNARD V. PARRETTE
Chief Administrative Judge

NEW OCS UNITIZATION RULES—AUTHORITY OF THE SECRETARY TO SEGREGATE PARTIALLY UNITIZED OFFSHORE LEASES

M-36927

December 16, 1980

Outer Continental Shelf Lands Act: Generally

The legislative history of the OCS Lands Act shows that the Secretary is authorized to modify and incorporate the regulatory provisions of the Mineral Leasing Act, as they existed in 1953 when the OCS Lands Act was passed, into OCS leasing regulations as the circumstances of offshore leasing make appropriate.

Outer Continental Shelf Lands Act: Unit Plans

Sec. 5 of the OCS Lands Act implicitly authorizes the Secretary to require compulsory unitization of offshore oil and gas leases.

Outer Continental Shelf Lands Act: Unit Plans

The Secretary is not authorized to require compulsory segregation of an offshore oil and gas lease when part of it is committed to a unit agreement.

Oil and Gas Leases: Unit and Cooperative Agreement

The authority to segregate partially unitized oil and gas leases must be clear, since segregation creates two new leases from a single lease and fundamentally modifies a lessee's legal rights and obligations. Such authority will not be presumed or extrapolated from a general grant of regulatory authority.

Outer Continental Shelf Lands Act: Unit Plans

Sec. 5 of the OCS Lands Act of 1953 does not provide the clear authority required to permit segregation of OCS leases, since it neither expressly mentions the power to segregate nor incorporates the segregation authority added to the Mineral Leasing Act in 1954.

Outer Continental Shelf Lands Act: Unit Plans

The U.S. Geological Survey may not condition its approval of any unit agreement or development plan for an offshore oil and gas lease upon the lessee's consent to segregation.

Outer Continental Shelf Lands Act: Generally

The Secretary generally is free to adopt any reasonable regulatory measures which he determines to be necessary and

proper to prevent waste, conserve natural resources, protect correlative rights, or carry out the leasing provisions of the OCS Lands Act, regardless of whether such measures are expressly listed in either that Act or the Mineral Leasing Act.

Outer Continental Shelf Lands Act: Oil and Gas Leases

The Secretary is authorized to require the prompt and efficient exploration and development of the entire area of each offshore oil and gas lease by § 5 of the OCS Lands Act, various regulations, the terms of each lease, and, in some cases, implied covenants of diligent development.

Continental Oil Company, 74 I.D. 229 (1967), distinguished.

To: Secretary of the Interior
From: Solicitor
Subject: New OCS Unitization Rules—Authority of the Secretary to Segregate Partially Unitized Offshore Leases

You have asked for my opinion on several questions of law concerning the new unitization rules for offshore oil and gas leases.[1] Specifically, you have requested my views regarding the validity of those rules which provide for the segregation of partially unitized OCS leases. Several offshore operators have challenged the authority of the Secretary to segregate such leases without the lessees' consent. This opinion examines those rules and clarifies the scope of the Secretary's OCS regulatory authority under the Outer Continental Shelf Lands Act.[2]

I. *CONCLUSIONS*

Sec. 5 of the Outer Continental Shelf Lands Act implicitly authorizes the Secretary to require compulsory unitization of offshore leases. The Secretary is not authorized, however, to require compulsory segregation of partially unitized OCS leases. The clear authority required for such segregation is not provided in the OCS Lands Act. The new segregation rules are thus invalid and must be modified to conform with this opinion. The basic objective of segregation under these regulations is to require the prompt and efficient exploration and development of the entire area of each OCS lease. The Secretary may still achieve this goal by other, authorized means. The necessary authority is provided by the OCS Lands Act, various regulations, the terms of each OCS lease, and, in some cases, implied covenants of diligent development.

II. *BACKGROUND*

A. *What Unitization and Segregation Entail*

The following is a simplified summary intended to clarify the nature of the subject problem. It is not meant to be a comprehensive or definitive statement of the law unitization.

[1] 30 C.F.R. 250.51–52, 45 Fed. Reg. 29280 (May 2, 1980).

[2] 43 U.S.C. § 1331 *et seq.* (hereafter "OCS Lands Act").

1. *The OCS Leasing System*

The OCS Lands Act, 43 U.S.C. § 1331 *et seq.*, provides a comprehensive system for the leasing of minerals on the Outer Continental Shelf. Unlike most commercial leases, an OCS oil and gas lease does not have a definite length of duration or "term." Instead, the OCS Lands Act divides the lease term into two phases. The first phase, called the "primary term," is the initial amount of time the lessee is given to explore and drill for oil and gas. During this initial period, which usually lasts five (5) years,[3] the lease generally will not expire, so long as the lessee pays the rent.[4] During the second phase, however, the lease may continue only as long as oil or gas is produced from the area in "paying quantities," or drilling or well reworking[5] operations are being conducted. 43 U.S.C. § 1337(b)(2). Thus, after the primary term, the term of each lease is indefinite and contingent upon performance by the lessee of one of the above activities within the lease area.

This "use it or lose it" rule is complicated by the nature of oil and gas production. Under the Rule of Capture, a rule of property ownership, oil and gas belong not to the person under whose lands they lie, but to the person who extracts or "captures" them from the ground. Frequently a single reservoir of oil or gas may underlie lease tracts belonging to two or more separate owners. In such cases, due both to the Rule of Capture and to the migratory nature of oil and gas, a strong incentive exists for each owner to produce as much oil and gas as possible from his own lease to prevent drainage to adjoining leases. In the past, this incentive has led to needless and costly drilling and large-scale waste of oil and gas.[6]

2. *Unitization of Leases Over Common Reservoirs*

Unitization removes this incentive and its concomitant problems. "Unitization" is an agreement between lessees (approved by the lessors) to treat the area above a common reservoir as one lease, *i.e.*, as a "unit." The separately owned lease interests are combined or consolidated for purposes of joint exploration and development of the reservoir. The lessees agree to share the cost and liabilities of production and to divide the oil or gas they produce under the terms of a "unit agreement."[7] By this arrangement the lessees can limit the number of wells drilled, drill in the most effici-

[3] *See* 43 U.S.C. § 1337(b)(2) (A) and (B).

[4] OCS leases also require the lessee to explore and develop the lease tract diligently.

[5] "Reworking" is performing maintenance on a well. It is also called "workover."

[6] Initially, oil and gas are pushed out of the ground by natural pressure as water or gas moves or expands in the reservoir. If the reservoir is developed too rapidly, this natural pressure may dissipate inefficiently and force out less oil and gas. The lessees must then either leave the oil or gas in the ground or resort to more expensive methods of production. *See generally* Kaveler, *The Engineering Basis for and the Results from the Unit Operation of Oil Pools*, 23 Tul. L. Rev. 331, 334 (1949).

[7] *See* 30 C.F.R. 250.2(iii), 45 Fed. Reg. 29285 (May 2, 1980).

ent locations, and control the rate of extraction, so as to maximize production and minimize costs. Pursuant to the existing regulations, the area subject to the unit agreement, the "unit area," may include only that portion of each lease under which the common reservoir lies.[8] Each lessee is free to develop the remaining portions of his lease at his sole profit or loss, unless such portions are subject to another unit agreement.

Unitization potentially creates a conflict, however, with the above-described "use it or lose it" rule. If for example, for engineering reasons all development work on a reservoir is done within one lease, ordinarily all other leases in the overlying unit area would expire after their primary terms, since no production, drilling, or reworking is occurring on those leases. This would encourage needless drilling by the other lessees simply to maintain their own leases and would thus frustrate one of the major purposes of unitization.

To resolve this conflict, the law provides that any drilling or production on one part of a unit area is attributable to all other parts of a unit area, even though such parts are on separate lease tracts. *Solicitor's Opinion*, M–36629, 69 I.D. 110, 111–12 (1962). Thus, if drilling or production on one lease within a unit area is sufficient to hold that lease beyond its primary term, all other leases within the unit area will also be continued. *Id.* This rule is called "constructive production" or "attributed production." This idea is consistent with the premise that the unitized area is to be operated as one lease.

3. *Segregation of Partially Unitized Leases*

"Segregation" refers to the practice of separating into distinct and different leases that portion of a lease which is committed to a unit agreement and that portion which is not so committed. Essentially segregation means splitting a lease in two whenever part of a lease is unitized.

This practice in turn has a significant impact on the "use it or lose it" rule. Since the portion of a lease outside the unitized area is segregated and thus considered a separate lease, any work done inside the unit area, even if within the unitized portion of the original lease tract, will no longer be attributed to the non-unitized portion under the rule of constructive production. Therefore, to maintain the nonunitized portion of a segregated lease past its primary term, the lessee must demonstrate adequate production, drilling, or reworking on that portion itself, independent of the obligations of the unitized portion. The theory behind this practice is that applying separate production requirements to each portion will encourage prompt development of the lease area in the entirety.

[8] *See* 30 C.F.R. 250.50(b), 45 Fed. Reg. 29285 (May 2, 1980).

4. *Authority to Segregate Must be Clear*

Because of these additional obligations resulting from segregation, the common-law of the state courts has generally provided that, unless the parties to an oil and gas lease have expressly agreed that the lease may be divided upon unitization, segregation will not be allowed without mutual consent. This presumption is known as the common-law "rule of indivisibility." [9] Specifically, the rule states that the habendum clause, which defines the term, of an oil and gas lease is indivisible unless there is a clear expression to the contrary.

Due in part to this common-law rule, this Department has also consistently held that the Secretary is not authorized to segregate onshore oil and gas leases issued under the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*, unless that act explicitly provides for such authority. These decisions will be more fully discussed below. In light of this firm position, and at the Department's request, Congress amended the Mineral Leasing Act in 1954 to expressly authorize segregation of partially unitized onshore leases.[10] This long-standing departmental recognition of the need for clear legislative authority to segregate onshore oil and gas leases is equally applicable to OCS leases.

B. *The 1980 Regulations On Unitization and Segregation*

On May 2, 1980, the Department promulgated new regulations governing unitization of federal offshore oil and gas leases issued under the OCS Lands Act.[11] The rules were issued pursuant to the Secretary's statutory duty to prescribe regulations for unitization and for the prompt and efficient exploration and development of OCS lease areas. 43 U.S.C. § 1334(a)(4) and (7).

In addition to clarifying and supplementing existing regulations on OCS unitization procedures and requirements, the new rules also provide for the first time that partially unitized OCS leases must be segregated into separate leases.[12] Upon segregation, the rules require that the terms of the original lease be applied separately to the unitized and non-unitized portions of the lease. Thus, the drilling, production, or reworking requirements of the OCS Lands Act must be independently satisfied on each segregated portion to maintain that portion past the primary term of the original lease. Work done on the unitized portion of a lease may not be attributed to the non-unitized portion and *vice versa*.[13] This is the classic concept of segregation. These provisions apply only to

[9] The rule of indivisibility is really a rule for construing leases rather than a principle of law. The legal rights of the parties are defined by the lease itself, and the lease is whatever the parties agree to. The rule of indivisibility simply states that, unless the right to segregate is made clear, it will not be recognized. *See generally* 5 *Summers Oil & Gas* § 959, p. 80 (1966).

[10] Act of July 29, 1954, P.L. 83-555, 68 Stat. 585.

[11] 30 C.F.R. 250.51-52, 45 C.F.R. 29280-87 (May 2, 1980).

[12] 30 C.F.R. 250.50(g)(1).

[13] 30 C.F.R. 250.50(g)(2) and (1).

leases issued after May 2, 1980, unless the lessee consents to segregation.[14]

Many offshore operators have asserted that these segregation rules are invalid, since the Secretary is not clearly authorized to segregate OCS leases by the terms of the OCS Lands Act. They have petitioned the Secretary to reconsider these regulations and delete the provisions relating to segregation.

III. *ANALYSIS: Authority of the Secretary to Regulate OCS Leases*

A. *The Secretary is Authorized to Require and Regulate Unitization of OCS Leases*

Unlike the Mineral Leasing Act, which explicitly authorizes the Secretary to unitize onshore leases and specifically requires the segregation of all such partially unitized leases,[15] the OCS Lands Act contains no express authority for unitization by the Secretary and does not even mention segregation. Instead, the original § 5 of the OCS Lands Act provided for a broad grant of regulatory authority:

> The Secretary shall * * * prescribe such rules and regulations as may be necessary to carry out such provisions [of the Act relating to OCS leasing]. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and the conservation of natural resources of the Outer Continental Shelf, and the protection of correlative rights therein. * * * Without limiting the generality of the foregoing provisions of this section, the rules and regulations prescribed by the Secretary thereunder may provide * * * in the interest of conservation for unitization * * *. 43 U.S.C. § 1334(a)(1) (1964 ed.).

"Unitization" was not defined in the Act itself. The term was presumed to have its common meaning, as well-established in oil and gas law. The 1978 Amendments to the Act[16] deleted the last sentence of the above provision and substituted the following:

> * * * The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—
>
> * * * * *
>
> (4) For utilization, pooling, and drilling agreement
>
> * * * * *
>
> and
>
> (7) For the prompt and efficient exploration and development of a lease area * * *. 43 U.S.C. § 2334(a)(4) and (7) (1980 supp.).

These changes merely clarify the Secretary's recognized authority to require diligent development of OCS leases and also removed the prefatory phrase "in the interest of conservation," which had formerly qualified the authority to regulate utilization. Otherwise, the original, broad grant of authority over OCS lease administration remained unmodified with respect to the Secretary's unitization powers.[17]

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[14] 30 C.F.R. 250.50(j).

[15] *See* 30 U.S.C. § 226(j).

[16] Act of Sept. 18, 1978, P.L. 95–372, § 204, 92 Stat. 636.

[17] *See* S. Rep. No. 1091, 95th Cong., 2d Sess. 82–3 (1978).

Although the OCS Lands Act does not expressly so provide, the legislative history of the 1953 Act indicates that the Secretary is authorized to require compulsory unitization of OCS leases. The Act originated as H.R. 5134 and was introduced in 1953 as a supplement to the Submerged Lands Act.[18] Sec. 10(g) of the House bill proposed to make the detailed unitization provisions of the Mineral Leasing Act directly applicable to OCS leases.[19] Those provisions then included, *inter alia*, express authorization for compulsory unitization by the Secretary.[20]

Shortly thereafter, the Senate introduced its own OCS bill, S. 1901.[21] This bill took the opposite approach from the House proposal. Instead of incorporating the detailed provisions of the Mineral Leasing Act, § 5 of S. 1901 gave the Secretary extremely broad regulatory powers: "The Secretary may prescribe such rules and regulations as he determines to be necessary and proper in order to provide for the conservation of the natural resources of the Outer Continental Shelf." [22]

On May 18, 1953, the sponsor of S. 1901, Senator Cordon, wrote to Interior Secretary McKay requesting his views on the Senate bill and on a committee print resembling the House proposal. The Secretary replied on June 8, suggesting a median approach:

> Section 5 of S. 1901 should be amended to expressly authorize the Secretary of the Interior to deal by regulations with such matters as unitization, pooling, subsurface storage of oil and gas, suspension of operations and production, waiver or a reduction of rentals or royalties, compensatory royalty agreements the assignment and surrender of leases, and the sale of royalty oil and gas. This authorization should, we believe, be provided for in general terms rather than more specifically as in effect provided for in § 5(e) of the committee print by adoption of portions of the Mineral Leasing Act of 1920 as amended * * *. If the authority to promulgate regulations on these subjects is cast in general terms, the Department would be free to incorporate the provisions of the Mineral Leasing Act on the same subjects, but would also be free to modify them as circumstances peculiar to operations and actual experience in administering a leasing program in the submerged lands made appropriate.[23]

At the end of this letter, the Secretary submitted a proposed draft of a revised version of § 5. Except for two minor changes,[24] the Senate adopted this version verbatim. Although the Senate later abandoned S. 1901, it incorporated this version of § 5 into its

[18] 43 U.S.C. § 1301 *et seq.*, 37 Stat. 29 (May 22, 1953).

[19] H.R. Rep. No. 413, 83rd Cong., 1st Sess. 10 (1953).

[20] In 1953, § 17(b) [now § 17(j), 30 U.S.C. § 226(j)] of the MLA provided in pertinent part as follows: "The Secretary may provide that oil and gas leases hereafter issued * * * shall contain a provision requiring the lessee to operate under such a reasonable cooperative or unit plan, and he may prescribe such a plan under which such lessee shall operate * * *." Act of Aug. 8, 1946, P.L. 79-696, § 5, 60 Stat. 952.

[21] 99 Cong. Rec. 4908 (May 14, 1953).

[22] S. Rep. No. 411, 83rd Cong., 1st Sess. 24 (1953).

[23] *Id.* at 28.

[24] The Senate added the clause "the assignment or relinquishment of leases" to the list of subjects within the Secretary's rulemaking authority. The House added a provision for state-federal cooperation. Senator Cordon explained these additions. *See* 99 Cong. Rec. 10472 (July 30, 1953).

amendments to H.R. 5134. The Conference Report adopted the Senate's amendment.[25] This became § 5 of the final act, as quoted above. The Secretary thus obtained precisely the broad, flexible authority he had requested.

This legislative history makes clear that the Secretary is authorized to modify and incorporate the provisions of the Mineral Leasing Act, as they existed in 1953 when the OCS Lands Act was passed, into OCS leasing regulations. Therefore, since the Mineral Leasing Act provided for compulsory unitization in 1953, the Secretary is also duly authorized to require compulsory unitization of OCS leases, when it is deemed necessary to prevent waste, conserve OCS resources, protect correlative rights, or further any other purposes of the OCS Lands Act. Such authority has been recognized and reflected in the Department's lease forms since the initiation of OCS leasing in 1953. *See* BLM Form 3300–1, § 16 (Sept. 1978).

B. *The Secretary Is Not Authorized to Require Segregation of Partially Unitized OCS Leases*

The Department has assumed that this broad grant of regulatory authority in § 5 of the Act also enables the Secretary lawfully to require the segregation of partially unitized OCS leases. This assumption is incorrect for several reasons.

Segregation is distinguishable from most types of regulatory measures. All such measures generally result in some additional burdens on lessees. Segregation, however, essentially restructures a lessee's actual legal rights and obligations, as agreed upon in the original lease. Sec. 8 of the OCS Lands Act, as well as the language of each lease, specifies the terms of the lease, including the length of duration or "term." Sec. 8 makes clear that production, drilling, or reworking on "the area" will be the basis for extending the habendum clause during the secondary term. 43 U.S.C. § 1337(a)(2). Initially, "the area" is clearly understood by both parties to refer to the lease tract as a whole. Segregation in effect rescinds the original lease and creates two new, distinct leases. "The area" then becomes two distinct areas, with distinct requirements for rent, royalties, and the extent of production needed to prolong the secondary term of each segregated lease. The original lease term is thus destroyed, and the lessee is subjected to a different legal relationship from the one he originally entered into. Therefore, segregation results in a fundamental modification of the lessee's original leasehold interest.

As noted above, this Department has consistently held that the Secretary is not authorized to segregate onshore oil and gas leases issued under the Mineral Leasing Act, except as that act expressly provides for

[25] H.R. Rep. No. 1031, 83rd Cong., 1st Sess. (1953).

such authority. Prior to 1954, partially unitized onshore leases were segregated for administrative purposes, but it was recognized that such segregation could have no substantive legal effects, since the Mineral Leasing Act contained no authority to create two separate leases from a single lease and thus modify the original lease term. Opinion of the Chief Counsel, Bureau of Land Management, *Extension of Oil and Gas Lease Term by Production*, GFS BLM–1953–175. *Gulf Oil Co.*, GFS BLM–1964–50. An amendment of the Act was necessary, in the Secretary's judgment, to permit actual segregation of the habendum clause of a lease.[26]

In 1954, at the Department's request, Congress amended the Mineral Leasing Act to expressly require segregation by the Secretary of any onshore lease which is partially committed to a unit agreement.[27] This authorization has been strictly construed. It has been held insufficient to permit segregation of a portion of a unitized lease which is *eliminated* from a unit plan (due to contraction of the unit area), since the Act speaks only of lands "committed" to such plans. *Solicitor's Opinion*, M–36592 (1960). *Continental Oil Co.*, 70 I.D. 473, 474 (1963). Therefore, the authority to segregate onshore leases must be clear. It will not be presumed or extrapolated from a general grant of regulatory authority.

This recognized need for clear legislative authority to segregate partially unitized onshore leases is equally applicable to OCS leases. Neither the terms nor the legislative history of the OCS Lands Act indicates, however, that such authority was provided for in that act. The language as well as the history of the Act, including Secretary McKay's letter to Senator Cordon, does not contain a single reference to segregation. Moreover, at the time the OCS Lands Act was being considered in 1953, the Mineral Leasing Act did not yet authorize the Secretary to segregate onshore leases. Secretary McKay's letter and the other legislative history noted above indicate that the Department was intended to be free to "incorporate and modify" the *then-existing* provisions of the Mineral Leasing Act into its OCS regulations. Since the segregation provisions of the Mineral Leasing Act were non-existent at that time, there is no evidence that either Congress or the Department intended or contemplated that the Secretary's OCS regulatory authority would encompass the power to segregate partially unitized OCS leases. Assumption of such power would clearly do more than merely "modify" or adapt the then-existing provisions of the Mineral Leasing Act, since both Congress and the Department felt a legislative amendment to those provisions was necessary to permit segregation of

[26] In the Department's Apr. 20, 1954 report to the Senate on S. 2380 and S. 2382, proposed amendments to the Mineral Leasing Act, the Secretary recommended the addition of an amendment which would expressly provide the authority to segregate partially unitized onshore leases. S. Rep. No. 1609 83rd Cong., 2nd Sess. 3 (1954). *See also* Hearing on S. 2380 before Senate Subcommittee on Public Lands, 83rd Cong., 2d Sess. 40 (May 12, 1954).

[27] Act of July 29, 1954, P.L. 83–555, 68 Stat. 585.

onshore leases. Therefore, the broad, general language of § 5 of the OCS Lands Act is not sufficient to provide the clear authority which is necessary to permit segregation of partially unitized OCS leases.

The decision of the Department concerning segregation of OCS leases by partial *assignment* is distinguishable from this situation. In *Continental Oil Co.*, 74 I.D. 229, 237 (1967) the Assistant Secretary stated that, when only part of an OCS lease is assigned to another party, the part assigned and the part retained may be segregated into separate leases under which each lessee is individually accountable for compliance with all the terms of the original lease. Segregation due to partial assignment is permissible, however, because the Mineral Leasing Act expressly authorized such segregation at the time the OCS Lands Act was passed.[28] As discussed above, § 5 of the OCS Lands Act was intended to authorize the Secretary to incorporate and modify the existing provisions of the Mineral Leasing Act into the Department's OCS regulations. Since segregation of partially *assigned* onshore leases was clearly provided for in 1953, the Secretary is authorized to modify and incorporate that practice into OCS leasing procedures as the peculiar circumstances of OCS leasing make appropriate. *Id.* at 233–34. However, no similar provision then existed in the Mineral Leasing Act regarding segregation of partially *unitized* leases. Nor is there any other evidence that comparable authority for such segregation was intended or contemplated in the OCS Lands Act. Therefore, the *Continental Oil Co.* case is inapplicable to the issue at hand.

It is emphasized that not every OCS regulatory measure or practice that the Secretary may wish to adopt need be explicitly provided for in either the Mineral Leasing Act or the OCS Lands Act itself. Sec. 5 of the latter act makes clear that the OCS regulations prescribed under that section shall include "but *not be limited to*," the subjects there enumerated. 43 U.S.C. § 1334(a). The original, 1953 version of § 5 also emphasized that the listing of specific subjects to be regulated was intended to be "without limiting the generality of the foregoing [regulatory authority] provisions." Secretary McKay's 1953 letter suggests that those listed subjects referred to the measures which are specifically outlined in the Mineral Leasing Act. Therefore, the Secretary generally is free under § 5 to adopt any other, unspecified regulations which he determines to be necessary and proper to prevent waste, conserve natural resources,

[28] In 1953, § 30(a) of the MLA provided in pertinent part as follows: "* * * [A]ny oil or gas lease * * * may be assigned * * *, as to all or part of the acreage included therein * * *. *Any partial assignment of any lease shall segregate the assigned and retained portions thereof*, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; * * *." (Italics added). Act of Aug. 8, 1946, 60 Stat. 955.

protect correlative rights, or carry out the leasing provisions of the OCS Lands Act. 43 U.S.C. § 1334 (a). However, since segregation actually creates two new leases from a single lease and thus fundamentally modifies a lessees' legal rights and obligations, and since the Department has consistently required clear legislative authorization for such segregation, the general language of § 5 may not properly be considered adequate authority to permit segregation of partially unitized OCS leases. The new OCS segregation regulations are thus invalid and must be revised.

It is also noted that the grandfather clause of the new rules provides that any lease issued before May 2, 1980 may not be segregated without the lessee's consent. 30 C.F.R. 250.50(j). Since the Secretary is not authorized to require compulsory segregation of future leases, it follows that he cannot condition approval of any unit agreement or development plan for any existing or future lease upon the lessee's consent to segregation.

C. *The Secretary Is Authorized to Require the Prompt and Efficient Exploration and Development of the Entire Area of OCS Leases*

The basic purpose of the invalid segregation rules is to encourage the prompt and efficient development of each OCS lease in its entirety. Segregation accomplishes this by forcing a lessee either to develop or to forfeit the non-unitized portion of each lease. Segregation is not necessary. however, to achieve this objective. The Secretary is currently authorized by statute, regulations, and the terms of each OCS lease to demand the prompt and efficient exploration and development of each OCS lease area as a whole. In addition, to the extent each lease is silent regarding the rate and extent of development required of the lessee, implied covenants of reasonably diligent development will be recognized which are legally enforceable by the Secretary.

One of the stated policies of the OCS Lands Act is to make the outer continental shelf available "for *expeditious* and orderly development." 43 U.S.C. § 1332(3). To fulfill this policy the Act requires the Secretary to prescribe regulations which include provisions "for the *prompt and efficient* exploration and development of a lease area." 43 U.S.C. § 1334(a)(7). This authority is extremely broad. The Secretary cannot breach vested contractual rights under the guise of ensuring prompt development, if the lessee is already diligently developing the entire lease area. *See Sun Oil Co.* v. *United States*, 572 F.2d 786, 814 (1978). Nor is this general authority sufficient to permit segregation of partially unitized leases, as discussed above. Otherwise, however, the Secretary may adopt any reasonable regulatory measures which are genuinely calculated to assure the prompt and efficient exploration and development of OCS leases.

Several existing regulations now authorize the Director of the U.S. Geological Survey to require drill-

ing or development on specific portions of OCS leases. All lessees are required to diligently drill and produce such wells as are necessary to protect the United States from loss by reason of production on other properties. 30 C.F.R. 250.33(a). In addition, lessees must:

> * * * *promptly* drill and produce such other wells as the supervisor may *reasonably* require in order that the lease may be *properly* and *timely* developed and produced in accordance with good operating practices. (Italics added). 30 C.F.R. 250.33(b).

Each lessee must also obtain approval of an exploration plan and a detailed development plan before any exploration, development, or production activities may occur on a lease. 43 U.S.C. §§ 1340 and 1351. After approval, no work may be done on a lease except in accordance with the respective plans. Both plans must identify, to the extent possible, all potential oil and gas accumulations, the number and location of proposed wells, and the time schedule for drilling.[29] The development plan must also provide for the "effective and efficient development and production" of certain oil and gas deposits.[30] The Director is required to periodically review the activities being conducted under both plans, and he has broad discretion to revise such plans after review.[31] Under this supervised planning scheme, the Director may initially disapprove or later revise these plans unless they contain adequate provisions for the prompt and efficient exploration and development of all portions of each lease. If the lessee fails to submit or comply with an approved or revised plan, the lease may be canceled. 43 U.S.C. §§ 1340(c)(1) and 1351(j). Moreover, if a lessee is found not to be meeting the above or any other "due diligence" requirements on one lease, he is disqualified from bidding on all other leases. 43 U.S.C. § 1337(d). Each lease is conditioned by statute upon compliance with these and all other existing or future OCS regulations. 43 U.S.C. § 1334(b). Noncompliance with any regulation or lease term is grounds for cancellation. 43 U.S.C. §§ 1334 (c) and (d).

The standard lease used by the Department, BLM Form 3300–1, § 10 (Sept. 1978), also provides that:

> * * * the Lessee shall drill such wells and produce at such rate as the Lessor may require in order that the leased area *or any part thereof* may be *properly and timely* developed and produced in accordance with sound operating principles. (Italics added).

In addition, each lease itself expressly incorporates and is subject to all existing and future OCS regulations. Therefore, the Secretary or the Director can require the prompt and efficient exploration and development of the non-unitized or any other specific portion of an OCS lease pursuant either to the above regulations or to the

[29] 30 C.F.R. 250.34–1(a)(1) and 34–2(a)(1), 44 Fed. Reg. 53693–98 (Sept. 14, 1979).
[30] 30 C.F.R. 250.34–2(a)(1).
[31] 30 C.F.R. 250.34–1(j) and 34–2(1).

terms of each lease. Exercise of such authority may serve the same purpose as would segregation.

It is also noted that, to the extent any OCS lease or incorporated development plan or regulation is silent regarding the rate, extent, or location of exploration or development required on a lease tract, the common-law will recognize implied covenants of diligent development by the lessee. Such covenants include the obligations to explore within a reasonable time, to conduct further, reasonable development after production is obtained, and to diligently operate all wells.[32] The diligence required of the lessee to develop the lease further is that of a "prudent operator," *i.e.*, "whatever, in the circumstances, would be expected of operators of ordinary prudence, having regard to the interest of both lessor and lessee." *Brewster* v. *Lanyon Zinc Co.*, 140 F. 801, 814 (8th Cir. 1905). What constitutes diligent development depends upon a variety of facts and circumstances which will vary in each case. *Id.* The covenants apply to the entire lease area and may be enforced on both the unitized and non-unitized portions of a lease. Breach of such covenants is grounds for cancellation of the entire lease. *Sauder* v. *Mid-Continent Petroleum Corp.*, 292 U.S. 272, 281 (1934). Therefore, in the absence of any of the above express provisions within or incorporated into an OCS lease, the Secretary may invoke and enforce these implied covenants to demand the prompt and efficient exploration and development of the entire lease area. Since such covenants will not be implied where an express provision is made regarding the required rate and extent of development, this theory will rarely be applicable to OCS leases. *Brewster* v. *Lanyon Zinc Co.*, *supra* at 814. This alternative theory ensures, however, that the Secretary can in all cases require the diligent development of the entire area of an OCS lease, even if the express terms of the statute, lease, or regulations fail to so provide.

CLYDE O. MARTZ
Solicitor

[32] *See generally* Brown, 5 The Law of Oil and Gas § 16.02 (1967 ed.).

UNITED STATES
v.
W. S. WOOD ET AL.

51 IBLA 301

Decided *December 18, 1980*

Appeal from a decision of Administrative Law Judge E. Kendall Clarke holding null and void certain mining claims in Whiskeytown-Shasta-Trinity National Recreation Area, Shasta National Forest. CA-2883.

Affirmed.

1. Mining Claims: Discovery: Generally

The discovery of a "valuable mineral deposit" has been made where minerals have been found and the evidence is of such a character that a person of ordi-

nary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

2. Mining Claims: Discovery: Generally

Evidence which will not justify development of a claim but may justify further exploration is not sufficient to establish that a discovery of a valuable mineral deposit has been made.

3. Mining Claims: Discovery: Generally—Mining Claims: Withdrawn Land—Withdrawals and Reservations: Effect of

Where land is withdrawn from the operation of the mining laws subsequent to the location of a mining claim, the validity of the claim cannot be recognized unless the claim was supported by a valid discovery at the time of the withdrawal. In addition, even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location.

4. Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Determination of Validity

When the United States contests a mining claim it has by practice assumed only the burden of going forward with sufficient evidence to establish a prima facie case on the charges in the contest complaint; the burden then shifts to the contestee to refute by a preponderance of the evidence, the Government's case.

5. Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Determination of Validity

The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government mining examiner testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable deposit.

6. Secretary of the Interior

The Secretary of the Interior is authorized, and is under a duty to consider and determine what lands are public lands of the United States, and after having made that determination the Secretary has the authority to determine the validity of mining claims on any public lands of the United States after adequate notice and opportunity for a hearing. A mining contest may be initiated under the authority of the Secretary of the Interior by the Bureau of Land Management at the behest of the Forest Service and prosecuted by counsel employed by the Department of Agriculture, with Forest Service employees as witnesses, where such action is in accordance with a Memorandum of Understanding between the agencies.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants; Charles F. Lawrence, Esq., U.S. Department of Agriculture, San Francisco, California, for contestant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Appeal has been taken from the decision of June 24, 1980, by Ad-

ministrative Law Judge E. Kendall Clarke, wherein he held certain unpatented lode mining claims [1] in the Shasta National Forest to be null and void because the contestees [2] in Contest CA 2883 had failed to prove a valid discovery as to each and every claim. The claims at issue occupy lands in the Whiskeytown-Shasta-Trinity National Recreation Area, a site withdrawn from location, entry, and patent under the United States mining laws by sec. 6 of the Act of Nov. 8, 1965, 16 U.S.C. § 460q–5 (1976).

A contest complaint was first issued on July 3, 1975, charging as follows as to the claims at issue:

> A. There are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.
>
> B. The land embraced within the claims is nonmineral in character.
>
> C. The land embraced within the claims is not held in good faith for mining purposes.
>
> D. The $100 worth of labor or improvements required by 30 U.S. Code, Section 28, has not been performed or made on or for such claims.

In Contest CA 2883, *United States* v. *Estate of W. R. Wood, a.k.a. Walter R. Wood*, Rodney Wood as Administrator of the Estate of W. R. Wood, deceased, denied the charges, and the matter came on for a hearing before Administrative Law Judge Dean F. Ratzman. Following the hearing Judge Ratzman declared all the claims null and void for lack of discovery. Following appeal to this Board Judge Ratzman's decision was affirmed insofar as it related to the interests of B. Victor Wood and Rodney Wood, but reversed insofar as it purported to affect the interest of W. S. Wood and any other heirs at law of Walter R. Wood. *United States* v. *Estate of W. R. Wood*, 34 IBLA 44 (1978). At the hearing before Judge Ratzman it was shown that the estate of Walter R. Wood had never been probated and that Rodney Wood was not administrator of the estate as no administrator, executor, or personal representative had ever been appointed to supervise the descent of Walter R. Wood's property. As both B. Victor Wood and Rodney Wood appeared at the hearing and contested the merits of the case as heirs at law of W. R. Wood, the decision declaring their interests null and void was affirmed. Although present at the hearing, Walter S. Wood did not participate in the proceeding.

Thereafter, following a renewed request from the Forest Service, U.S. Department of Agriculture,

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[1] The Fox Mine, formerly known as January; Candaleria Copper Mine, a.k.a. Canadalana; E. Valena Mine, a.k.a. Evelena Claim and Evalena; Triangler Quartz Mining Claim; Mangenes No. 2 Mine; White-House Quartz Mining Claim, a.k.a. White Horse; Duck Mine; Gass Mine; Banar No. 2 Mine, a.k.a. Baner No. 2 and Banner No. 2; and Thy Angler Clame, a.k.a. Thry Angler Mine Quartz Mining Claims, situated in the W½ sec. 1, T. 33 N., R. 4 W., Mount Diablo meridian, Shasta County, California, within the Shasta National Forest and the Whiskeytown-Shasta-Trinity National Recreation Area.

[2] The complaint which led to the instant decision of Judge Clarke is styled *United States* v. *W. S. Wood, a.k.a. Walter S. Wood; Unknown Heirs and Devisees of W. R. Wood, a.k.a. Walter R. Wood, Deceased; and Unknown Owners.*

the California State Office, Bureau of Land Management (BLM), reissued on Jan. 9, 1979, a complaint in contest CA 2883 and served this pleading by publication under the styling, *United States* v. *W. S. Wood, a.k.a. Walter S. Wood, heirs and devisees of W. R. Wood, a.k.a. Walter R. Wood, deceased, their heirs, personal or legal representatives, or assigns*, charging exactly as in the original contest against the identical unpatented mining claims.

Denial of all of the statements in the complaint was made by Walter S. Wood, B. Victor Wood, and Rodney Wood. The State Office accepted the answer by Walter S. Wood, but advised the other respondents that their interests in the subject claims had been declared null and void in *United States* v. *Estate of W. R. Wood, supra.* The matter came on for a hearing before Administrative Law Judge E. Kendall Clarke on Oct. 31, 1979, at Sacramento, California.

We have reviewed the record established at the hearing and conclude that Judge Clarke has accurately reported the material evidence and testimony therein given in his decision to declare the aforementioned mining claims null and void. We affirm.

Appellants contend that the positive prudent man opinion of their witness, Tibor Klobusicky, being supported by testimony of probative facts, preponderates over the negative prudent man opinion of Emmett Ball, the Government's witness. Appellants further argue that the Forest Service had no authority to initiate the prosecution of this case and that the U.S. Department of the Interior has no jurisdiction over lands of the State of California. Finally, appellants request that this Board rule on each of 50 proposed findings of fact.

The Judge summed up the evidence and testimony as follows:

Mr. Emmett B. Ball, Jr., a mining engineer with the United States Forest Service, testified he had given testimony at the hearing involving these same ten lode mining claims on January 19, 1977. (Tr. 10). He had examined the claims again in April, 1979. No changes were detected on the claim. He took a grab sample from the Mangenes No 2 claim and had it assayed. (Tr. 17). The assay report disclosed .06% managanese and a major amount of iron. (Tr. 20). Iron gossan exposures were seen on the Mangenes No 2 claim. (Tr. 26). He examined all ten of the claims in issue. (Tr. 29).

Sample No. 2465 was taken from the Gass claim. (Ex. D). A spectrographic analysis revealed the major constituent was silicon. (Ex. H–1, Tr. 33). Sample No. 2466 was taken from the claim boundaries between the Evalena and Triangler claims. The spectrographic analysis disclosed silicon as the major mineral. (Ex. H–2 Tr. 34). Negligible amounts of gold were recovered. (Ex. H–5). Sample No. 2467 was taken from the Mangenes No 2 claim and it showed the major mineral as silicon. (Ex. H–3). Silicon was also the major constituent found in Sample No. 2468 taken from the south end of the Mangenes No 2 claim. (Tr. 35, Ex. H–4). In addition, a chemical assay of Sample No. 2468 revealed only .07% manganese. (Tr. 37, Ex. H–5). Sample No. 2474 was taken from the Candaleria claim and the spectrographic analysis found the major constituents to be silicon and iron. (Ex. H–7). A fire assay of this sample showed only .015

oz. of gold per ton. (Ex. H–6). No other points were sampled. (Tr. 42). In Mr. Ball's opinion, a prudent person would not spend time mining any of the claims for iron or manganese. (Tr. 47).

In order to develop an economically viable mining venture to extract iron ore, it would take millions of tons of ore reserves and millions of dollars to construct a processing plant. (Tr. 52). The mining claimants initially expressed an interest in mining for manganese, gold, silver and copper. (Tr. 54).

The transcript of the hearing held on January 19, 1977, which contained the testimony of Emmett B. Ball, was entered into the record. In essence, Mr. Ball believes that there are no valuable mineral deposits exposed on any of the claims that would justify a prudent man in developing any of the claims. He examined all the claims but took samples on only five of them. Mr. Ball found two houses and a lot of "junk cars." No mining equipment was found but two old adits were on the claims. One was caved in and the other was being used as a root celler. The land was not used for mining. (Tr. 25). No significant amounts of manganese or iron were disclosed in the spectrographic analysis.

Mr. Walter S. Wood, a mining claimant, testified he has milled thousands of tons of ore during his mining career. He was a research metallurgist. (Tr. 62). He found hematite on the claims. (Tr. 64). Manganese is restricted to the Mangenes No 2 claim. (Tr. 66). Mr. Wood has also found gold and silver on the claims. (Tr. 67). However, he does not recall from where it was collected. (Tr. 68). Diamond drill exploratory holes were placed on several claims to depths of 140 feet. Hematite iron was found. (Tr. 71). However, these holes were not on any of the claims subject to this contest. (Tr. 72). Surface cuts were also made but they were not on any of the contested claims.

On cross-examination, Mr. Wood stated that after he had core drilled on several locations, the findings encouraged him to proceed to obtain further financial backing. However, he did not name any particular individuals who would be interested in developing the claims. (Tr. 79).

Tibor Klobusicky, a registered professional engineer and consulting geologist, testified on behalf of the mining claimant. (Tr. 82). He is a qualified mining engineer with extensive experience in mining for manganese and iron. (Tr. 84). As a member of the Bunker Hill Mining Company's exploration staff, he spent two years investigating iron ore deposits in the Redding, California area. (Tr. 85). These iron ore deposits were known as the Lakeshore Mines and they are a mile northwest of the Wood family claims. The Lakeshore deposits were abondoned because other high grade ore deposits were discovered in Australia and Brazil. (Tr. 91).

Mr. Klobusicky examined the iron deposits in the western half of Section one in which the Wood family claims are located. Examinations were made in February and April of 1979. The February examination concentrated on manganese development and the April examination on iron ore potential. (Tr. 92). Five samples of iron ore material were taken in April. (Tr. 93). The arithemetic average of these five samples was 39.6% iron. (Tr. 97). In Mr. Klobusicky's opinion, this is a commercial grade of iron ore. The price of iron as of the date of the hearing was 64 [cents] per percent per ton. (Tr. 99). Mr. Klobusicky could not determine whether the iron ore on the claims could be marketed at a profit. (Tr. 100).

Mr. Klobusicky took four samples from the manganese structure found on the Mangenes No 2 claim. (Tr. 107). Sample No. 1176 revealed 16 percent manganese (See Ex. 18–A). Sample No. [1177], taken 232 feet southwest of Sample No. 1176 contained 16.9% manganese. Approximately 128 feet away, Sample No. [1178] assayed 6.9% manganese. At 85 feet away from Sample [1178], Sample No. 1179 disclosed only .8% manganese. (Tr. 108). He estimated a manganese re-

serve of 55,000 tons at an average grade of 13.2% (Tr. 108).

When asked whether a prudent man would develop the ten contested Wood family claims, Mr. Klobusicky believed he presently could not make such a determination. He believed more development work was needed. Significantly, he conceded that most of his sampling work took place outside of the Wood claims although they were very close to those claims. By geological inference, he projected the mineral deposits onto the Wood claims. (Tr. 110). Nonetheless, he would encourage a prudent man to develop these claims. (Tr. 111).

Upon further questioning, Mr. Klobusicky testified he recommended that the Wood family conduct further exploration and delineation of the iron and manganese deposits on the claims. (Tr. 114). More information about the ore deposits is needed. (Tr. 116). Mr. Klobusicky could not state that he had seen a sufficient tonnage of manganese to support a practical operation. (Tr. 118). Although he believed that he took four samples from the Mangenes No 2 claim, he was not sure where his sample points were in relation to the claims. He was told that he was on the Mangenes No 2 claim and therefore assumed his sample points were on that claim. (Tr. 120). He had no independent knowledge of where the sample points were since he did not locate any claim corners or do any surveying. (Tr. 121). He recommends that future development be conducted away from the Mangenes No 2 claim. (Tr. 121). Before mining for manganese, a 25% to 30% grade of manganese ore should be found. (Tr. 136).

Two reports on the Deep Pit Mine (Ex. 17 and Ex. 18) prepared by Mr. Klobusicky were admitted into evidence. A report dated September 10, 1979 evaluated the iron ore potential of the gossan zones in the area. No accurate outline of the gossan zones were made although a map of the estimated zone was prepared. Detailed exploration, which includes drilling, is needed to determine the extent of the iron ore deposit. Mr. Klobusicky's estimates included lands outside of the Wood claims.

It is well established that the *sine qua non* for a valid mining claim located on public lands of the United States is discovery, as the location of a mining claim conveys to the claimant no rights against the United States until there is shown a discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 23 (1976). *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Converse* v. *Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969). Implementation of this standard has been left to the Executive and the Courts. *Converse* v. *Udall*, *supra* at 619.

[1] The Supreme Court, in *Chrisman* v. *Miller*, 197 U.S. 313 (1905), approved the so-called "prudent man test" of discovery enunciated by the Department in *Castle* v. *Womble*, 19 L.D. 455, 457 (1894), that discovery has been achieved when one finds a mineral deposit of such quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The Court has followed this decision consistently since that time. *Accord*, *United States* v. *Coleman*, 390 U.S. 599 (1968); *Best* v. *Humboldt Placer Mining Co.*, *supra*; *Cameron* v. *United States*, 252 U.S. 450 (1920); *Cole* v. *Ralph*, 252 U.S. 286

(1920). *See also Multiple Use, Inc.* v. *Morton*, 504 F.2d 448 (9th Cir. 1974); *Adams* v. *United States*, 318 F.2d 861 (9th Cir. 1963); *Lange* v. *Robinson*, 148 F. 799 (9th Cir. 1906). The prudent man test has been complemented by the "marketability test" requiring a claimant to show that the mineral can be extracted, removed, and marketed at a profit. *United States* v. *Coleman*, *supra; Converse* v. *Udall*, *supra.*

[2] Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. A valuable mineral deposit has not been found simply because the facts might warrant a search for such a deposit. *Barton* v. *Morton*, 498 F. 2d 288 (9th Cir. 1974); *United States* v. *Porter*, 37 IBLA 313 (1978). Similarly, it is not enough that the mineral values exposed justify further exploration to determine whether actual mining operations might be warranted. In order to have a valid mining claim, valuable minerals must be exposed in sufficient quantities to justify development of the claim through actual mining operations. *United States* v. *Marion*, 37 IBLA 68 (1978).

Geological inference may only be relied upon in evaluating the extent and potential value of a particular exposed mineral deposit under the prudent man test of discovery and may not be employed as a substitute for the actual finding of a mineral deposit within the limits of the claim. *United States* v. *Bechthold*, 25 IBLA 77 (1976). Geological inference alone cannot support a determination under the mining laws that a discovery of a valuable mineral deposit has been made. The claimant must actually expose a valuable mineral deposit physically within the limits of the claim. *United States* v. *Walls*, 30 IBLA 333 (1977). Evidence necessary to demonstrate the existence of an ore body or bodies sufficient to warrant a prudent person to develop a valuable mine may not be shown by geologic inference. Similarly, such inference may not be used to infer mineralization throughout an area where the evidence shows a few spots of high mineralization, but the mineralized areas are spotty and discontinuous. *United States* v. *Edeline*, 39 IBLA 236 (1979).

[3] When land is closed to location under the mining laws subsequent to the location of a mining claim, the claim cannot be recognized as valid unless all requirements of the mining laws, including discovery of a valuable mineral deposit, were met at the time of the withdrawal and the claim presently, *i.e.*, at the time of the hearing, meets the requirements of the law. *United States* v. *Porter*, *supra*; *United States* v. *Netherlin*, 33 IBLA 86 (1977). Where land occupied by a mining claim has been withdrawn from operation of the mining laws, the validity of the claim must be tested by the value of the mineral deposit as of the date of the with-

drawal, as well as of the date of the hearing. *United States* v. *Chappell*, 42 IBLA 74 (1979); *United States* v. *Garner*, 30 IBLA 42 (1977). Even though there may have been a proper discovery at the time of a withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is at present supported by a sufficient discovery. The loss of the discovery, either through exhaustion of the minerals, changes in economic conditions, or other circumstances, results in the loss of the location. *United States* v. *Wichner*, 35 IBLA 240 (1978).

[4] When the United States contests a mining claim, it has assumed only the burden of going forward with sufficient evidence to establish a prima facia case on the charges in the contest complaint; the burden then shifts to the contestee to refute, by a preponderance of the evidence, the Government's case. *Hallenbeck* v. *Kleppe*, 590 F. 2d 852 (10th Cir. 1979); *United States* v. *Springer*, 491 F.2d 239 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974); *Foster* v. *Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

[5] The United States has established a prima facie case of the invalidity of a mining claim when a qualified Government mining engineer testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable mineral deposit. *United States* v. *Taylor*, 25 IBLA 21 (1976).

It is the duty of mining claimants whose claim is being contested to keep discovery points available for inspection by Government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim, nor do they have to go beyond examining the discovery points of the claimant. The function of the Government's examiners is to examine the discovery points made available by the claimants and to verify, if possible, the claimed discovery. *United States* v. *Bryce*, 13 IBLA 340 (1973). Where a claimant fails to keep his discovery points open and safely available for sampling by the Government's examiner, or declines to accompany the examiner on the claim, he assumes the risk that the Government examiner will be unable to verify the alleged discovery of a valuable mineral deposit. *United States* v. *Russell*, 40 IBLA 309 (1979), *aff'd sub nom. Russell* v. *Peterson*, Civ. No. 79-949 (D. Or., June 23, 1980); *United States* v. *Knecht*, 39 IBLA 8 (1979); *United States* v. *Bechthold*, *supra*.

Appellants argue that the Forest Service, U.S. Department of Agriculture, had no authority to initiate this contest and further contend that the Department of the Interior has no jurisdiction over lands of the State of California. Appellants seem to be suggesting that title to the lands in the unpatented claims resides with the State of California. It is difficult to consider this argument as other than facetious. All land embraced within California

was ceded to the United States by Mexico under the Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922. California was admitted into the Union on Sept. 9, 1850, 9 Stat. 452.[3]

The official land status records in the BLM State Office, Sacramento, California, show that as to the W½ sec. 1, T. 33 N., R. 4 W., Mount Diablo meridian, the following actions have occurred:

SW¼ was withdrawn for Power Project No. 397, March 8, 1923;

E½ SW¼ was withdrawn under the First Form for the Central Valley Project, July 29, 1936;

W½ SW¼ was withdrawn under the First Form for the Central Valley Project, July 16, 1947;

W½ was placed in the Shasta National Forest by the Act of March 19, 1948, 62 Stat. 83;

W½ was withdrawn from location, entry, and patent under the United States mining laws and placed in the Whiskeytown-Shasta-Trinity National Recreation Area by the Act of November 8, 1965, 16 U.S.C. § 460q–5 (1976).

None of the recorded actions affecting the W½ sec. 1, T. 33 N., R. 4 W., have removed the land from the sovereign jurisdiction of the United States Government.

[6] The organization and duties of the Department of the Interior are set out in 43 U.S.C. §§ 1451–1457 (1976). The Department of the Interior has plenary authority over administration of public lands, including mineral lands. *Best* v. *Humboldt Placer Mining Co.*, *supra*. The Secretary of the Interior is the supervising agent of the Government to do justice to all claimants and to preserve the rights of the people of the United States. *Knight* v. *United States Land Association*, 142 U.S. 161 (1891). The Secretary of the Interior has, under a grant of authority to supervise public business on public lands, including mines, the power to initiate contests through the subordinate Bureau of Land Management in order to see that valid claims are recognized, invalid ones eliminated, and the rights of the public preserved. *Duguid* v. *Best*, 291 F.2d 235 (9th Cir. 1961), *cert. denied*, 372 U.S. 906 (1963).

Pursuant to a memorandum of understanding, effective May 3, 1957, between the Forest Service, Department of Agriculture, and the Bureau of Land Management, Department of the Interior, the Regional Forester will recommend initiation of contests against unpatented mining claims within national forests. Upon determining that the elements of a contest are present, BLM will issue the contest complaint stating the charges recommended by the Forest Service. Hearings will be held before Administrative Law Judges of the De-

[3] Sec. 3 of the Act of Sept. 9, 1850, *supra*, states in part:

"Sec. 3. *And be it further enacted*, That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned."

See California v. *United States*, 438 U.S. 645, 654 (1978); *Donnelly* v. *United States*, 228 U.S. 243, 259 (1913).

partment of the Interior, appointed pursuant to 5 U.S.C. § 3105 (1976), and the Government's case will be presented by a member of the Office of the General Counsel, Department of Agriculture. A mining claim within a national forest may be contested by the Forest Service at any time prior to issuance of patent. 43 CFR 1862.4.

Although the administration of the national forests is vested in the Secretary of Agriculture, the Secretary of the Interior has the responsibility of determining the validity of mining claims in the national forests and providing the administrative forum by which that Department may determine its right to possession, control, and administration of lands on which mining claims have been located within a national forest. *United States* v. *Bergdal*, 74 I.D. 245 (1967).

The Secretary of the Interior has the authority to determine the validity of mining claims on any public lands of the United States after adequate notice and opportunity for a hearing. A mining claim contest may be initiated under the authority of the Secretary of the Interior by the Bureau of Land Management at the behest of the Forest Service and prosecuted by counsel employed by the Department of Agriculture, with Forest Service employees as witnesses, where such action is in accordance with a Memorandum of Understanding between the agencies. *United States* v. *Freese*, 37 IBLA 7 (1978).

Further to undermine the argument of appellants is their occupation, over many years, of the land in the unpatented mining claims under the guise of the United States mining laws. The location notice for each claim at issue states that the claim is located in compliance with the Revised Statutes of the United States. R. S. § 2319 is derived from sec. 1 of the Act of May 10, 1872, 17 Stat. 91, now codified as 30 U.S.C. § 22 (1976). It provides that all valuable mineral deposits in lands belonging to the United States shall be open to exploration and purchase by citizens of the United States. R.S. § 2320, based on sec. 2 of the Act of May 10, 1872, and codified at 30 U.S.C. § 23 (1976), delimits the length of a mining claim along a vein or lode. The location notices of the subject claims comport with these sections of the United States mining law. Moreover, for many years Rodney Wood, a claimant, filed annual proof of labor for the claims at issue in satisfaction of the requirement in R.S. § 2324, sec. 5 of the Act of May 10, 1872, 30 U.S.C. § 28 (1976). In 1970, Rodney Wood, on behalf of himself, Victor Wood, Walter S. Wood, and Wallace Wood, heirs under the Estate of Walter Roy Wood, filed a notice of intention to hold the subject claims within a withdrawn area without performing assessment work as provided by the laws of the United States. It is thus abundantly clear that these claimants have continuously considered their unpatented

mining claims to be on lands of the United States and they have attempted to hold the claims through their alleged conformance with the requirements of the applicable Federal mining laws. We find their argument on appeal that the United States has no jurisdiction over the unpatented claims to be without merit.

Appellants submitted 50 proposed findings of fact and requested a ruling on each. The applicable section of the Administrative Procedure Act (APA), 5 U.S.C. § 557 (c) (1976), provides:

> (c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.
>
> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

Of the proposed findings of fact, all except one were submitted to Judge Ratzman in 1977 following the first hearing involving these mining claims. At that time Judge Ratzman declined to pass on the proposed findings individually. The following excerpt from his decision adequately addresses and describes the largely irrelevant character of these requested findings:

> The attorney for the Wood brothers filed approximately 15 pages of requested findings of fact and conclusions of law. However, the requested findings are interlarded with (1) references to mining that occurred approximately sixty years ago on claims in Section 36, to the north of the contested claims, (2) accounts of activity many years ago at a smelter at Heroult which is no longer operating, (3) generalities concerning a manganese bearing porphyry which is observable in an adjacent township, and colors and coatings on gossan and "iron cap" found on the contested claims, (4) references to general testimony about fault zones, transportation courses, fracture patterns, sulphide deposits and intrusive rock, (5) statements contending that minerals were produced and sold from one of the contested claims, based on conclusions of one Logan who reportedly has corrected or modified material in Bulletin 152, *Manganese in California*, Exhibit 8, and (6) descriptions of drilling and other work on claims not involved in this contest.

Clearly, these were not the findings of fact and law contemplated by the APA, *supra*. The Board found no error in the decision of Judge Ratzman not to pick through these proposed findings. and expressly found that appellants' APA rights had been adequately satisfied. *United States* v. *Estate of W. R. Wood*, 34 IBLA at 51. As we found no error in the declination of Judge Ratzman to rule on each of the findings, so we continue to decline to review each finding individually. *See Deep South Broadcasting Co.* v. *F.C.C.*,

278 F. 2d 264 (D.C. Cir. 1960); *Community & Johnson Corp.* v. *United States*, 156 F. Supp. 440 (D. N.J. 1957).

We have considered the proposed findings and conclusions submitted, and, except to the extent that they have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts or because they are not relevant to the rulings that have been made. *See National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F.2d 645 (6th Cir. 1954); *United States* v. *Zweifel*, 11 IBLA 53, 80 I.D. 323 (1973).

Appellants also argue that the evidence of Dr. Klobusicky detracts from the negative prudent man conclusion expressed by mineral examiner Ball for the Government. In support, they cite *Charlestone Stone Products Co., Inc.* v. *Andrus*, 553 F.2d 1209, 1213 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 604 (1978):

> We cannot affirm the examiner's conclusion simply by isolating a specific quantum of supporting evidence. * * * Davis, 4 Administrative Law Treatise § 29.03 (1958) * * *. Evidence which may be logically substantial in isolation may be deprived of much of its character or its claim to credibility when considered with other evidence. * * * and *Universal Camera Corp.* v. *N.L.R.B.* (1951) 340 U.S. 474, 484–88.

It is conceded that Dr. Klobusicky possesses impressive qualifications as a mineral expert, but we cannot agree that his testimony and evidence preponderate over the negative conclusion expressed by the Government's witness. In the final analysis, the greater part of Dr. Klobusicky's testimony related to land not within the 10 mining claims at issue.

> [BY MR. LAWRENCE:]
>
> Q Well, if I understand you correctly, you thereafter moved your sample points approximately one quarter mile, if I read the scale correctly, southwest, because you—southeast—southwest, because you were advised to do so by one of the claimants, is that right?
>
> [BY DR. KLOBUSICKY:]
>
> A That's right. Because I was told that I was not here at the time of sampling, but I was on the Mangenes Claim. I have no way of disclaiming or verifying this. It can be usually verified by finding the claims. I didn't do any surveying of my own.
>
> Q Do you have any independent knowledge at all of where your sample points were then other than what the claimant may ultimately have told you?
>
> A No, I didn't do any surveying, or didn't tie my samples to corners, claim corners. I don't know.
>
> Q Well, isn't it true then except for the four sample points which you now state were relocated on this map, you did no sampling on the 10 claims in issue?
>
> A That's correct, yes.
>
> Q So you have no first-hand information as to any one of them, do you?
>
> A No.
>
> Q What you state then is based solely on inference that whatever may be underground may extend into one of those 10 claims?
>
> A That's right.

(Tr. 120–21).

Dr. Klobusicky stated that he did not know the location of the corners of the claims so he could not state positively that the mineral showings he saw were on the claims.

Q In other words, whatever activity they should carry on in the future should be in a precisely opposite direction than the Manganese [*sic*] No. 2 Claim?

A That's right.

Q Very well. And I take it also that because of the decreasing values shown by these samples, you would not presently be in a position to recommend that further activity take place on the Mangenes No. 2, is that not also correct?

A I don't—unless I know the exact position of my samples, it is not very hard to establish by finding the section corners, which I'm told they are all in, where the exact position is. I would need to know how much ground is there left on the Mangenes No. 2 to explore in either direction. But I'm looking at this as a mining project not as a claim line. I'm following structures not property lines.

Q Well, you understand, of course, that today's proceeding does concern property lines and claim lines?

A Yes, but it is very hard for me to understand why—well, I have elaborated on this before.

* * * * *

Q Did you ever learn the boundaries of any of the 10 claims under consideration today?

A No. I haven't seen or looked for claim corners. I was trying to carry out the geological assignment.

Q And how did you determine where any of your samples was, in fact, taken so that you could locate them on a map?

A Mr. Rodney Wood guided me throughout my work on the property, and with each sample, as I entered the samples into my sample book, I asked him where we are at, because I couldn't tell. I relied on the information received from him.

(Tr. 121–22, 143).

To the contrary, Dr. Klobusicky emphasized that he relied upon geological inference to suggest the presence of minerals on the claims. In response to several direct questions, he stated that much more exploration, including drilling, was necessary to determine the extent of the mineral occurrence on the claims at issue.

Q Well, you—implicit in your recommendation, if I hear it correctly, is that they should obtain more information about what is there, is that roughly it?

A That's right. What is there was calculated and the tonnage were outlined and go in the mining procedure—you go from the known into the unknown areas. You expand your known reserves and try to amplify your economics.

Q I assume that until they obtain this additional information, it is not your recommendation that they start mining operations?

A No, no. This is not normally being done.

* * * * *

Q Your recommendation is that you obtain more information, isn't that correct?

A Right. Expansion of the existing reserves.

* * * * *

Q Are you able to form any sort of rough estimate as to what it might cost to develop the needed information?

A Well, I will have to try to evade the question the best I can.

(Tr. 116–17, 123, 129).

Dr. Klobusicky did not recommend commencement of mining operations for either iron or manganese based on the present information.

Q What I am asking you is what percentage would you feel should be shown by your sampling before you would recommend that mining take place?

A Well, a mining project is a function of basically two economic factors; one

is grade and the other is tonnage. And then the third, of course, is marketing. Manganese now in the latest issue of the Mining and Engineering Journal was quoted at $1.40 per unit per ton, which would imply the 16 percent times $1.40, how much—$18.00 or $20.00.

Q That would be about $22.00?

A Yes.

Q Well, would that in your opinion be a practicable operation?

A If sufficient tonnage developed.

Q Well, have you seen any indications yet that there is sufficient tonnage?

A I can't say. There could be. I can't say.

Q The determination has yet to be made I take it?

A Right.

* * * * *

Q Now if we talk a moment only about the iron deposits which are asserted to be on these claims, can you state when consideration was first given to the possibility that there might be worthwhile iron deposits on these claims?

A Well, the Wood brothers brought this property to Bunker Hill's attention in '64 as an iron ore prospect.

Q And were you involved in that particular inquiry?

A I've examined, based on their submittal, I've examined the property.

Q And did you make any report at that time as to what, if anything, should be done with the iron occurrences on the claims?

A I recommended examination in more detail, and the response was to the effects—I have to rack my brains—to the effect that it will be contingent, further work would be contingent upon the outcome of the ironex project.

Q Which project is that one?

A The ironex project.

Q Oh, yes.

A Which is located at one mile to the northwest of the Wood property.

Q I see. What was the nature of the additional information you thought would be required.

A Drilling of the same kind that we have carried out on the ironex property.

Q Then, after that date, it was your belief that a great deal more information would be required before any kind of mining operation could commence I take it?

A Right, that's correct.

Q Very well. Now when was attention next given, after that date, to the possibility of there being a worthwhile iron deposit, to your knowledge?

A Well, I was asked to carry out the examination of this complex of claims the beginning of '79, with the view of giving attention to any potential in the area, and that included iron, manganese, silver and gold.

Q And I take it your view still remains that more information should be developed before further—before mining takes place, is that correct?

A That's correct.

* * * * *

Q Well, are you not saying that you have to hope for betterment of the marketing conditions before the development can proceed?

A Well, this risk is generally accepted by mining. We are developing right now zinc deposits because zinc, in spite of the fact that the zinc world markets are low, but they are not going to stay low. We have a reasonable expectation of that.

Q Well, do you know of any potential developer of this property to whom you would recommend today—

A No, I do not.

Q I didn't quite finish the sentence. You would recommend today that he would come in and develop it?

A Sorry.

Q Very well. Now I think we've been talking about the iron, potential iron deposits. Do you have any different views as to the potential magnesium deposits?

MR. MURRAY: Manganese.

MR. LAWRENCE: Manganese, excuse me.

WITNESS: Manganese is generally in short supply, but it takes a volume

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and grade to develop a mine. So there are indications of volume and grade, in my opinion, here based on my sampling and based on the California Report, where some quantities of ore were mined and ran on the average, I believe, 27 percent.

BY MR. LAWRENCE.

Q Do you know of any manganese user or buyer to whom you today make a recommendation in regard to this property any more enthusiastic than the recommendation you'd made in iron?

A No, I'm not familiar—too familiar with the mining—with the managanese ore industry.

Q Again, wouldn't it be reasonable to believe that further information would have to be obtained concerning the manganese, its quality and quantity, before anyone could proceed?

A That's right.

(Tr. 117–18, 126–27, 133–34).

No serious indications of either gold or silver were found by Dr. Klobusicky on the subject claims. The witness further declined to express any opinion as to possible profitable mining operations on the 10 claims.

[BY MR. LAWRENCE:]

Q Did you make any effort to obtain the results of the earlier drillings, the drill logs, or were you just informed that they weren't available?

A No. If they are not available, I don't know what I can do about it.

Q Who represented to you that they were not available? One of the Woods?

A Mr. Rodney Wood, yes.

Q What information was given to you by the Woods, firm information which was utilized by you in the preparation of any one of your reports, including the early Bunker Hill report?

A I was given the map by Mr. Free and the State of California Bulletin 152, and then reference was made to my own examination made in 1964.

Q And I take it no firm information was given to you as to any values in the ground—

A No.

Q —other than this very general material?

A No, except the assay data on the maps.

Q Now turning to the —briefly to the ironex project, you indicated, I believe, that it was abandoned at the eleventh hour because it was discovered that cheaper deposits had been uncovered in Australia, is that correct?

A That's correct

Q Did that mean that at that point there were no longer available any buyers for the ore in that deposit?

A That correct.

Q Do you know if there have been any buyers since that day for that ore?

A Well, Oregon Steel expressed an interest and still might be holding it. I don't know who is the present owner of the deposits. So those kind of deposits that have generally an economic potential are being held by major companies as a mineral reserve, because market conditions and economic changes locally or on a world-wide scale—if you have a significant deposit that was once already considered as an economically viable deposit being held in a mineral reserve status and pending economic, other developments.

Q Are you perhaps saying that the market has to improve in order to develop the deposit?

A Probably, yes, or a crisis or a war or—there are many—we have seen the last two years very drastic changes in metal prices, copper, zinc, lead, silver raised about 600 percent, gold about 1200 percent. So very drastic shifts in mineral economics.

Q Well, in any event, this particular project was abandoned, was it not, because it couldn't meet the competition provided by Australia?

A That's correct.

Q And so far as you know it has not been financially practicable to start the project up again?

A Not to my knowledge.
Q Now would the same reservations not apply to the whatever iron presence there may be on the Wood claims?
A Yes, it certainly would.

(Tr. 130–32).

We agree with Judge Clarke that the contestees did not prove that a prudent person would expend further labor and means with a reasonable prospect of developing a valuable mine.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

JAMES L. BURSKI
Administrative Judge

AMANDA COAL CO.

2 IBSMA 395

Decided *December 22, 1980*

Appeal by Amanda Coal Co. from the Apr. 21, 1980, decision of Administrative Law Judge David Torbett, Docket No. NX 0–34–R, sustaining the violation of 30 CFR 715.17( )(2)(iv) (described as a failure to surface an access road with durable material) alleged by the Office of Surface Mining Reclamation and Enforcement in Notice of Violation No. 79–2–39–27.

Affirmed.

1. Constitutional Law: Generally—Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Scope of Review

The Interior Board of Surface Mining and Reclamation Appeals is not the proper forum to consider the constitutionality of regulations promulgated by the Secretary.

APPEARANCES: J. L. Roark, Esq., Cook & Roark, Whitesburg, Kentucky, for Amanda Coal Company; Courtney W. Shea, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Walton D. Morris, Jr., Esq.. and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

This appeal was brought by Amanda Coal Co. (Amanda) from the decision of Administrative Law Judge David Torbett, issued orally on Mar. 19, 1980, and confirmed in writing on Apr. 21, 1980, sustaining a violation of 30 CFR 715.17(*l*)(2)(iv) alleged by the Office of Surface Mining Reclamation and Enforcement (OSM) in Notice of Violation (NOV) No. 79–2–39–27.

Factual and Procedural Background

An inspection by OSM of a surface coal mining and reclamation

operation conducted by M.T.S. Leasing Co. in Knott County, Kentucky, pursuant to permit No. 060–7001, resulted in the issuance of NOV No. 79–2–39–27.[1] Of the four violations of the Department's initial program regulations alleged in the NOV, only that of 30 CFR 715.17(*l*)(2)(iv), described by OSM as a failure to surface as access road with durable material, remains in issue.[2]

Review of the NOV before the Hearings Division occurred on Mar. 19, 1980. At the conclusion of the hearing, the Administrative Law Judge issued an oral decision, confirmed in writing on Apr. 21, 1980, sustaining the alleged violation of 30 CFR 715.17(*l*)(2)(iv).[3] The basis for this decision was the determination that the proof of the parties respecting the alleged violation was in equipoise.

Discussion and Conclusions

The applicant for review of a notice or order issued pursuant to sec. 521 of the Act bears the ultimate burden of persuasion of the invalidity of an alleged violation.[4] Accordingly, when the proof offered at a review hearing by the applicant merely challenges but does not overcome the prima facie case persented by OSM, the contested fact is sustained.

[1] Amanda has not challenged the determinations below that OSM presented a prima facie case in support of the alleged violation of 30 CFR 715.17(*l*)(2)(iv) and that the proof offered by both parties concerning that alleged violation was of equal weight. Appellant has only argued that the burden of proof prescribed in 43 CFR 4.1171(b) violates its right to equal protection under the United States Constitution.[5] We have repeatedly indicated that the Board is not the proper forum to consider the constitutionality of regulations promulgated by the Secretary.[6]

For the foregoing reasons, that portion of the decision below sus-

[1] This enforcement action was taken pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977 (Act), Act of Aug. 3, 1977, 91 Stat. 504–07, 30 U.S.C. § 1271 (Supp. II 1978). The NOV was originally identified as No. 79–2–39–26 and issued to Amanda Coal Co. (a subsidiary of M.T.S. Leasing Co.. said to be operating under Kentucky permit No. 260–5003. It was later modified in the respects of its number and the identities of the recipient and permit under which the subject operation is conducted. M.T.S. Leasing Co. is the permittee or operator identified in the modified NOV and is the real party in interest in these proceedings. Because the decision below refers to Amanda Coal Co., however, that name is used to identify the appellant in this decision.

[2] 30 CFR 715.17(*l*)(2)(iv) provides in pertinent part: "Access and haul roads shall be surfaced with durable material. Toxic- or acid-forming substances shall not be used."

[3] Three other violations alleged in the NOV were vacated by the decision below. OSM did not appeal those portions of the decision.

[4] 43 CFR 4.1171 provides:

"(a) In review of sec. 521 notices of violation or orders of cessation or the modification, vacation, or termination thereof, including expedited review under § 4.1180, OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice, order, or modification, vacation, or termination thereof.

"(b) The ultimate burden of persuasion shall rest with the applicant for review."

[5] More particularly, appellant has noted that a different burden of proof obtains, under 43 CFR 4.1155, to the party initiating review in a civil penalty proceeding, and has concluded that the difference between this burden and that prescribed in 43 CFR 4.1171 results in a denial to appellant of the equal protection of law contemplated under the United States Constitution.

[6] *See, e.g., Keister Coal Co.*, 2 IBSMA 59 (1980); *C & K Coal Co.*, 1 IBSMA 118, 86 I.D. 221 (1979).

taining the violation of 30 CFR 715.17(*l*)(2)(iv) alleged in NOV No. 79-2-39-27 is affirmed.

WILL A. IRWIN
Chief Administrative Judge
NEWTON FRISHBERG
Administrative Judge
MELVIN J. MIRKIN
Administrative Judge

MIAMI SPRINGS PROPERTIES

2 IBSMA 399

Decided *December 23, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from a June 23, 1980, decision of Administrative Law Judge Tom M. Allen in Docket No. CH 0-97-R, dismissing the case and vacating violation 1 of Notice of Violation No. 79-I-58-21 and Cessation Order No. 79-I-37-3 on the grounds that OSM had failed to present a prima facie case that Miami Springs Properties was required to return an orphan highwall to approximate original contour under 30 CFR 715.14.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally—Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination—Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Previously Mined Lands

The augering of a coal seam in an orphan highwall may make a permittee responsible for returning the entire highwall to approximate original contour.

2. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

In this case, because OSM presented sufficient evidence to establish a prima facie case that the permittee had augermined the coal seam at the base of an orphan highwall and that that mining had an adverse physical impact on the highwall, it was error for the Administrative Law Judge to grant a motion to dismiss made at the conclusion of OSM's evidence.

APPEARANCES: Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed the June 23, 1980, decision of Administrative Law Judge Tom M. Allen granting Miami Springs Properties' (Miami Springs) motion to dismiss for OSM's failure to present a prima facie case. For the reasons set forth below, we hold that the motion to

dismiss should not have been granted and remand the case to the Hearings Division for further proceedings.

Background

On Sept. 13, 1979, OSM inspected Miami Springs' operation under permit 60–78 in Lewis County, West Virginia, pursuant to the Surface Mining Control and Reclamation Act of 1977.[1] Permit 60–78 was issued on Apr. 14, 1978, and allowed Miami Springs to auger-mine a previously mined coal seam at the base of an orphan highwell.[2] No company representatives were present during the inspection, but the inspectors observed an auger in place and four auger holes at the base of the highwall.

Following the inspection, OSM issued Notice of Violation No. 79–I–58–21 to Miami Springs. Violation 1 cited the failure to return the disturbed area to approximate original contour, in violation of 30 CFR 715.14.[3] After a followup inspection OSM issued Cessation Order No. 79–I–37–3 on Dec. 28, 1979, for failure to abate violation 1 of the notice.

Miami Springs sought administrative review of the notice and order, and a hearing was held on May 23, 1980. The written decision, issued on June 23, 1980, confirmed the decision from the bench granting Miami Springs' motion to dismiss made at the conclusion of OSM's evidence. The decision found that OSM had failed to present a prima facie case. OSM appealed this decision and filed a brief. Miami Springs did not file a reply brief.

Discussion and Conclusions

[1] It is evident from the record that the decision below was based upon a misconception of *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979). The Administrative Law Judge stated at the hearing in *Miami Springs* that

> the Board did not mention the augering of coal at all in its discussion in Cedar and, yet, the evidence in Cedar Coal was that it was, in fact, an augering situation * * *. * * * [I]t is neither the intention of the Act nor the finding of the Board that an orphan highwall must be returned to [approximate original contour] from augering mining [*sic*], if it complies with the State requirements. The Act does not touch it and the findings of the Board in Cedar Coal will be followed.

(Tr. 13, 15. *See also* Tr. 127). It is true that the Board's decision in *Cedar* did not mention augering. It is also true that the initial decision in *Cedar* did not mention augering. The reason for this is that the undisputed testimony in that case was that, although the permit allowed augering, none had taken place before the notice of violation was issued (Tr. in *Cedar Coal Co.*, Docket No. CH 8–17–R at 38, 44). Therefore, the Board's decision in *Cedar* does not address the question of whether the augering of a

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. II 1978).

[2] As used in this opinion, an orphan highwall is a highwall that was left unreclaimed by previous mining operation.

[3] Violation 2, which alleged the construction of a haul road off the permit area, was not pursued by OSM.

coal seam in an orphan highwall makes a permittee responsible for returning the entire highwall to approximate original contour.

The Administrative Law Judge also stated that

> [t]he Board, in essence, ruled [in *Cedar*] and II, in essence, ruled that the interim regulations did not cover orphan highwalls. They covered the creation of new highwalls * * *. The Board did not disturb that finding, so I am bound by my own finding in Cedar Coal, which was not disturbed by the Board.

(Tr. 11. *See also* Tr. 15). Initially, we note that the decision in *Cedar* specifically states that "we agree with OSM that Cedar's operation is subject to the performance requirements of the interim regulations." 1 IBSMA at 154, 86 I.D. at 255. That statement was qualified only by the conclusion that Cedar had not "'disturbed' the orphaned highwall, within the meaning of sec. 710.11(d)(1)," so as to be responsible for completely eliminating the highwall. 1 IBSMA at 154, 86 I.D. at 255. This conclusion was reached because "[t]here [had] been no showing that Cedar's removal of overburden [had] resulted in any adverse physical impact on the orphaned highwall." 1 IBSMA at 155, 86 I.D. at 256. The clear implication of this language is that a permittee who did disturb an orphan highwall in such a way as to cause an adverse physical impact on the highwall might be responsible for its complete elimination.

Secondly, what the Administrative Law Judge terms a "finding" in *Cedar* was actually his conclusion of law that orphan highwalls were per se excluded from the initial regulatory program. As was just discussed, the Board did not accept this conclusion. Furthermore, as the Board has previously noted, a decision of the Hearings Division or any part of such a decision is the law of that case only and is not precedential authority for future cases. *Toptiki Coal Corp.*, 2 IBSMA 173, 176 n. 4, 87 I.D. 331, 333 n. 4 (1980).

Thus, no holding of the Board precludes a showing by OSM that Miami Springs' augering operations resulted in an adverse physical impact upon an orphan highwall. The question before the Board, therefore, is whether the motion to dismiss was properly granted because OSM failed to present a prima facie case. The Board has previously discussed what constitutes a prima facie case. In *James Moore*, 1 IBSMA 216, 223 n. 7, 86 I.D. 369, 337 n. 7 (1979), we stated: "A prima facie case is made where sufficient evidence is presented to establish the essential facts and which evidence will remain sufficient if not contradicted. It is evidence that will justify but not compel a finding in favor of the one presenting it." In attempting to establish a prima facie case, OSM is entitled to rely on the representations of company officials. *Burgess Mining and Construction Corp.*, 1 IBSMA 293, 86 I.D. 656 (1979). The company can, however, present evidence challenging the substance

of those representations and the authority of the individual making them to bind the company. *Island Creek Coal Co.*, 1 IBSMA 316, 86 I.D. 724 (1979). If the company's evidence is sufficient, it can rebut OSM's prima facie case. *Sunbeam Coal Corp.*, 2 IBSMA 222, 87 I.D. 383 (1980).

[2] In this case, OSM presented evidence that its inspectors observed an auger in place on the minesite, auger holes at the base of the highwall, and disturbance along the entire length of the permit area. Company officials told the inspector that mining had taken place as provided for in the permit. Miami Springs was the only company authorized to mine this area. OSM also presented testimony and photographs indicating that tension cracks had recently developed in the area immediately above the highwall. Such cracks are strong evidence that movement had occurred in the highwall. This evidence establishes a prima facie case that Miami Springs' operations had caused an adverse physical impact on the highwall. It was, therefore, error for the Administrative Law Judge to grant Miami Springs' motion to dismiss.

Miami Springs may be able to present evidence tending to rebut OSM's case. Such evidence should be presented in the context of an evidentiary hearing.

Therefore, the decision of June 23, 1980, is reversed and this case is remanded to the Hearings Division for the presentation of evidence by Miami Springs, if the company chooses to present evidence, and for any further proceedings not inconsistent with this decision.

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

TEXACO, INC., GULF OIL EXPLORATION AND PRODUCTION CO.

51 IBLA 332

Decided *December 29, 1980*

Appeal from a decision of the Director, Geological Survey, affirming an order of the Conservation Manager directing appellants to subscribe to and operate under a unit plan allocating production on the basis of net acre-feet. GS–145–O&G.

Affirmed.

1. Oil and Gas Leases: Drainage—Oil and Gas Leases: Unit and Cooperative Agreements—Outer Continental Shelf Lands Act: Oil and Gas Leases—Outer Continental Shelf Lands Act: Unit Plans

An order by a Conservation Manager of the Geological Survey directing oil and gas lessees of Outer Continental Shelf lands to subscribe to a unit plan allocating production from a specific reservoir on the basis of original net acre-feet of gas-bearing sand, *i.e.*, the volume of gas-bearing sand in place prior to production of any gas from the reservoir, will be affirmed where such a plan of allocation of production is in common use on OCS lands and it has not been shown that the order is arbitrary or capricious.

APPEARANCES: Shirley C. Friend, Jr., Esq., New Orleans, Louisiana, for Texaco; Milton L. Duvieilh, Esq., New Orleans, Louisiana, for Gulf; Joseph C. Bell, Jr., Esq., Washington, D.C., for Shell; Charles Broome, Esq., New Orleans, Louisiana, for Exxon.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Texaco, Inc. (Texaco) and Gulf Oil Exploration and Production Co. (Gulf) have each appealed from the decision of the Director, Geological Survey (GS), GS–145–O&G, dated Sept. 14, 1979, wherein the Director affirmed an order issued by the Conservation Manager, Gulf of Mexico Outer Continental Shelf (OCS) Operations, directing Texaco, Gulf, Exxon Co., U.S.A. (Exxon), and Shell Oil Co. (Shell) to subscribe to and operate under a unit plan covering a competitive gas reservoir in the Eugene Island Block 330 field, Outer Continental Shelf. The gas reservoir underlies parts of Eugene Island Block 313, 314, 331, and 332 offshore Louisiana and is situated in the "J2 Sands" within four leaseholds, OCS–G 2111 and OCS–G 2613 (Exxon), OCS–G 2116 (Shell), and OCS–G 2608 (Texaco) issued pursuant to sec. 8, Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1337 (Supp. II 1978).[1] Under the unit plan, production would be allocated on the basis of the original productive net acre-feet of gas-bearing sand, *i.e.*, the volume of gas-bearing sand in place, prior to production of any gas from the reservoir. Production was allocated as follows:

Exxon leases OCS–G2111 and OCS–G 2613	59.52776 percent
Shell lease OCS–G 2116	36.49844 percent
Texaco lease OCS–G 2608	3.97380 percent

Production of gas from the reservoir commenced on Exxon's lease OCS–G 2111 in Jan. 1974; from Shell's lease OCS–G 2116 in Dec. 1975; from Exxon's lease OCS–G 2613 in Nov. 1976; and from Texaco's lease OCS–G 2608, well A–11, on Dec. 20, 1976. The Oil and Gas Supervisor, on Nov. 16, 1976, determined that the reservoir under the Shell and Exxon leases was competitive, and thereafter on Mar. 18, 1977, the Conservation Manager determined that the following reservoir in the Eugene Island Block 330 field should be operated under an approved plan of unitization in the interest of conservation:

Exxon leases OCS–G2111 and OCS–G 2613	"D" Sand, reservoir C (DRC).
Shell lease OCS–G 2116	"J2" Sand, reservoir F (J2RF).
Texaco lease OCS–G 2608	"D" Sand, reservoir C (DRC).

[1] OCS lease G 2608 is held jointly by Texaco and Gulf. Texaco is the operator of the lease.

The parties were given 6 months to submit a proposed plan of unitization of the reservoir designated as "J2RF" in the Block 330 field. However, no agreement could be reached by the lessees as to an acceptable basis for allocating the unit production from the J2RF (Shell), and DRC (Exxon and Texaco). By letter of Jan. 5, 1978, the Conservation Manager advised the lessees that he would accept an allocation formula based on either the original net acre-feet or the original recoverable reserves and that the effective date of unitization would be Apr. 1, 1977. The parties were allowed until Feb. 15, 1978, to submit the plan of unitization. Except for the allocation formula, Article 13 of the unit agreement, and Exhibit C, unit participation, the lessees agreed to a plan of unitization. By letter of Apr. 7, 1978, the Conservation Manager approved the unit agreement for the J2RF Sand, Blocks 313, 314, 331, and 332, with the allocation based on the original productive net acre-feet. Texaco and Gulf appealed to the Director, Geological Survey, who by decision of Sept. 14, 1979, GS-145-O&G, affirmed the Conservation Manager's order.

The Director's decision after delineating the competitive nature of the reservoir and describing the the reservoir and describing unitization authority, stated:

> 3. The provisions in unit plans prescribed by a Conservation Manager must be upheld unless they are arbitrary, capricious, or constitute an abuse of discretion. The Conservation Manager exercised his authority to prescribe a unit plan only after the parties had reached an impasse following almost a year of negotiations. The terms of the unit plan here involved represent a reasonable exercise of the Conservation Manager's discretionary authority. The order allocated the production from the reservoir to each lease on the basis of the productive net acre-feet underlying each leasehold. This is a commonly used allocation method. [Although] Gulf and Texaco are urging that production be allocated partly in terms of well producing capacity * * * the Conservation Manager properly determined that, in the absence of an agreement by the parties, allocation based on original productive net acre-feet would provide for a reasonable and equitable allocation of production.
>
> The reserves underlying the Exxon and Shell leases are significantly greater than those underlying the Gulf-Texaco lease. Allocation based on current productivity would in effect award appellants some of the gas underlying the Shell and Exxon leases.
>
> Moreover, the production rate of well A-11 is a point-in-time factor which is expected to change. The Texaco-Gulf well A-11 is located in an unfavorable structural position. Available data suggests that the well is located near a sealing fault which, in the case of a water-drive reservoir, is likely to contribute to an early "watering out." * * * The production history of the well supports this conclusion. During December 1977, well A-11 produced 276 barrels of water and 1,447,458 MCF of gas; during May 1978, the A-11 well produced 22,731 barrels of water and 552,825 MCF of gas.
>
> The use of large diameter tubing is not an advanced design concept which must be "rewarded" by including productivity as an allocation parameter. * * *
>
> Although Gulf contends that it will be unable to recoup drilling costs, Gulf has no right to expect recoupment of such costs by production of gas underlying tracts under lease to Shell or Exxon. * * *
>
> The unit plan effective date is the first of the month following the issuance of

the order requiring unitization. The effective date chosen has a rational basis, and it will therefore be upheld.

Our affirmance of the Conservation Manager's order should not be understood as implying that approval of a different unitization plan would have been unreasonable. Each unitization plan involves a great many factors which can be structured in various equitable forms.

On the ground that the issues had been extensively briefed, the Director also denied a request for oral argument.

[1] The primary issue presented by Texaco's appeal is whether or not under the facts of this case the high productivity of Texaco's A-11 well, producing from the unitized sand, should be recognized and given equity participation in the involved unit.

Texaco argues that there is nothing in OCSLA, *as amended*, and its implementing regulations which would prohibit or prevent productivity from being a factor in determining unit equity. To the contrary, Texaco contends, it is to the advantage of the lessor and the nation to foster productivity, and the other parties to the unit will not be improperly or unduly prejudiced thereby, citing sec. 102(2) and (3), OCSLA Amendments of 1978, 43 U.S.C. § 1802 (Supp. II 1978).

It is contended that the Director's decision failed to take into account and give effect to appropriate and relevant factors required in reaching a correct determination in this matter. Three substantive conclusions were made in the Director's opinion, *supra*, all of which, in Texaco's opinion, improperly address issues of utmost importance. Texaco believes these conclusions are unsupported by the record and offers the following reasons:

Conclusion No. 1 outlines the authority for requiring unitization and provides for: a) prevention of waste, b) conservation of resources of the OCS, and c) protection of correlative rights. [Sec. 5 (a)(1), OCSLA, *as amended*, 43 U.S.C. § 1334 (Supp. II 1978), and 30 CFR 250.50.] The denial of Texaco's appeal is invalid primarily because protection of correlative rights is employed as an artifice to overlook or ignore both the resource-conservation principles and the prevention of waste aspects that are inherent in the directed authority.

Conclusion No. 2 states that unitization furthers the interest of conservation. Texaco continues to agree with the general principle that reservoir-wide unitization is of conservational interest. At the same time, however, Texaco contends the *method of participation* proposed and the denial of our appeal is not only unsupported by the records, but is also an abuse of regulatory discretion. Conclusion No. 2 attempts to promote a regulatory virtue of preventing added drilling by Exxon and Shell since their wells would constitute added potential for pollution. The conclusion thus accommodates a correlative rights aspect that ignores the desirability of improved hydrocarbon recovery from the reservoir. Texaco strongly disputes the appeal denial for ignoring so vital an issue. High producing rates unquestionably improve recovery by raising the reservoir-pressure drawdowns and reducing the residual-gas saturations remaining behind the advancing gas-water interface during depletion of partial water-drive reservoirs. Refusal to recognize such a fundamental recovery principle is invalid and contrary to law and equity. [Italics in original.]

Conclusion No. 3 contends that, while other participation parameters may have a justifiable basis at other times and places, acre-feet is a commonly used method and is reasonable and equitable. The conclusion states, "Our affirmance of the Conservation Manager's order should not be understood as implying that approval of a different unitization plan would have been unreasonable. Each unitization plan involves a great many factors which can be structured in various equitable forms." Denial of Texaco's appeal, we are to interpret then, is based on one corner of the triad of responsibilities given the Conservation Manager. The denial embraces protection of correlative rights by stopping Exxon and Shell from driling additional wells and thereby adding to pollution potential. Texaco's appeal and request for inclusion of productivity as a participation factor would have allowed the Conservation Manager's exercise of responsibility to recognize in the participation formula the other two aspects, i.e., preventing underground waste and conservation of natural resources of the OCS. Eliminating the two latter aspects in the participation mechanism is improper under the circumstances and will be harmful to future OCS development, be repellant to the principles involved in increased hydrocarbon recovery, and will not be in the national interest of increasing gas production. Moreover, the denial of the appeal will encourage operators in the future to avoid normally prudent drilling programs endeavoring to accomplish high productivity and, on the pretense of pollution potential, encourage them to attempt to insert undrilled, unproven acreage into units with low daily producing rates. As an example, without the high productivity of the A–11 well, additional wells would be necessary to produce the reservoir at the high withdrawal rates required to maximize recovery. Similarly, had other operators completed their wells for high withdrawals, far fewer wells would have been necessary for effective depletion. Texaco must therefore conclude that waste reduction, resource conservation, and pollution potentiality are very misunderstood principles that were applied haphazardly and unfairly and far too late in the reservoir development cycle.

Additionally, Texaco asked for oral argument before the Board.

The position of Gulf is succinctly set forth in its statement of reasons on appeal:

> [Gulf] maintains the Conservation Manager's requirement that it drill prior to unitization, coupled with his unit plan allocating production by a forumla which ignored the high productivity rate of the well and simultaneously resulted in appellant's lease receiving less than 4% of unit production, deprived appellant of its equitable share of unit production or the beneficial use of its leasehold and constituted a taking of property for public use without due process and compensation. The allocation formula distributing unit production on the basis of original productive net acre-feet of gas-bearing sand should be modified to include an appropriate productivity factor which recognizes the unusual productivity rate of the A–11 Well in relation to the other unit wells.
>
> * * * * *
>
> * * * The Conservation Manger simply is not empowered to formulate a rule or regulation, the effect of which can result in the confiscation of the lessee's equitable share of unit production or the beneficial use of his lease rights. The Conservation Manager's allocation formula is so onerous as applied to the facts and circumstances involved in this instance, that it can be considered nothing less than a taking without compensation as prohibited by the Fifth Amendment. The conclusion is inescapable that the Conservation Manager, in adopting the allocation formula, did not consider the impact on a federal lessee, did not consider that the federal lessee was required

to drill a well to recover the reserves underlying the federal lease, and did not consider the well's superior productivity rate in the allocation formula controlling lessee's participation in unit production.

Exxon took a contrary position. Its position is well summarized in its brief to the Board from which we quote:

Exxon believes that the Director acted correctly in affirming the Conservation Manager's order, which in Exxon's view is in the interest of conservation and allocates to each working interest owner its share of the reservoirwide unit on a basis that is fair and equitable.

While Exxon believes that the record as it stands is adequate to support an affirmation of the Director's decision, it undertakes to briefly address Texaco's and Gulf's contentions in this appeal as follows:

1. Texaco argues that the Director applied an incorrect standard of review in affirming the Conservation Manager's order.

Exxon does not regard this as a significant issue, since it is Exxon's belief that the order is sustainable under a wholly independent standard of review as well as under the "arbitrary, capricious, or abuse of discretion" standard.

2. Texaco contends that the Director's Conclusion No. 1 overlooks or ignores the resource conservation and waste prevention aspects of Interior's unitization authority as set out in the OSC Lands Act, and that protection of correlative rights is used as an "artifice."

It is well settled that each of the three statutory criteria is in its own right a valid basis for unitization, and Exxon believes that the Department exercised proper regulatory discretion in this instance, where both protection of correlative rights and conservation in the sense of eliminating unnecessary wells are served by the unitization order.

3. Texaco, in discussing Conclusion No. 2, takes the position that the *method of participation* in a unit affects reservoir management of the unitized reservoir.

Exxon maintains that reservoir management is a function of economic feasibilities and application of Petroleum Engineering principles. Method of participation in a unit has no relationship to either of these basic concepts. In Conclusion No. 2, the Director correctly recognizes that, absent unitization, wells unnecessary for draining the reservoir but necessary for the protection of correlative rights would have been drilled; thus unitization was in the interest of conservation. The Director also agrees with Exxon's contention that there are sufficient completions and future workover opportunities to adequately and efficiently drain the reservoir. This is demonstrated by the continued decline in reservoir pressure. Thus, the Director has correctly recognized fundamental reservoir management concepts.

4. Texaco contends, in discussing only part of Conclusion No. 3, that the Director's decision "is based on one corner of the triad of responsibilities given the Conservation Manager."

Exxon maintains that as reservoir pressure has been declining and is continuing to decline, economically preventable underground waste is not occurring. Further, it is established that preventing the drilling of unnecessary wells is inherently conservation of natural resources. Industry is and has been making high-volume completions. Economic and reservoir considerations, not potential unit participation interests, dictate where high-volume completions are made. In instances where a reservoir has a short life, the added cost of making a higher-volume completion could constitute economic waste. In other instances, high-volume completions eliminate the drilling of unnecessary wells, thus conserving resources and avoiding waste. The need for high-volume completions must be evaluated on the specific circumstances

including experience available at the time of making the decision applicable to a given well or reservoir.

* * * * *

Exxon submits that the Conservation Manager's order was a reasonable exercise of regulatory discretion, and that the Director's decision sustaining it should be left undisturbed.

Exxon does not believe that oral arguments before the Board are necessary, in view of the fact that arguments on both sides have already been thoroughly presented.

Shell asserts that the decision of the Conservation Manager allocating production on the basis of net acre-feet was proper, as the A–11 well has no characteristics which warrant preferential treatment for Texaco and Gulf, and the high level of production from the A–11 well is likely to be a transitory phenomenon. Consequently, the allocation formula adopted by the Conservation Manager best serves the interests of conservation.

In conclusion, Shell stresses that the Conservation Manager's decision to allocate production on the basis of net acre-feet is rational and supported by the evidence in the record, and it should be affirmed. Under the facts of this case, it contends an allocation formula based on the productivity of a single well at a given point in time would be contrary to the interests of conservation and, thus, in derogation of the purposes unitization is designed to serve.

Texaco and Gulf each requested the opportunity for oral argument before the Board, a request that both Shell and Exxon opposed. However, after reviewing the opening briefs and the record, the Board granted oral argument, which was heard July 22, 1980. Appearing were Shirley C. Friend, Esq., for Texaco; Milton L. Duvieilh, Esq., for Gulf; Joseph C. Bell, Jr., Esq., for Shell; and Charles Broome, Esq., for Exxon. Although invited to appear and participate, no representative of the Solicitor's Office appeared on behalf of Geological Survey.

At the oral argument, Texaco stated that the Eugene Island Block 330 unit under discussion is the first compulsory unit imposed by GS in the Gulf area. The argument was presented that the Texaco well, A–11, was the most prolific producer of gas in the entire Gulf and that it had contributed more than 3.97 percent of unit production. In Texaco's view, its well was drilled to protect the correlative rights of Texaco against the existing gas wells of Exxon and Shell. The A–11 was spudded in June 1976 with the drilling completed by mid-July, but the casing was not perforated nor tubing installed until Dec. 1976 because of a lack of a pipeline connection. When the well was completed, 4½-inch tubing was utilized for the production. The well produced up to 50 MMCFGD during the period from Dec. 20, 1976, until it watered out in Oct. 1979. Total gas produced from A–11 was in excess of 26 BCF. Accordingly, Texaco contends that the allocation of production from the unit should be based 50 percent on net acre-feet of sands and 50 per-

cent on productivity, adverting to the method of allocation approved by GS in the Vermilion Block 320 unit.

Texaco stated that it had not been included in the original GS determination that the J2RF was competitive, even though the A–11 well had been reported to GS prior to the date of initial determination. The J2RF unit was made effective Apr. 1, 1977, less than 4 months after A–11 went on production. In contrast, Exxon had been producing from the reservoir for more than 3 years and Shell for more than 1 year. Production prior to the effective date of unitization was not subject to the allocation formula of the unit.

Texaco maintained that it had to drill A–11 to protect its correlative rights in the J2RF, as OCS Order No. 11 required a producing or producible well within the reservoir in order to participate in the unit agreement.

The larger tubing, 4½ inch, was used to recover the hydrocarbons as quickly and economically as possible. Texaco admitted that the high production from A–11 included some drainage from both Exxon and Shell, but insisted that the high rate of withdrawal increased the ultimate recovery from the J2RF reservoir. The high recovery of A–11, Texaco maintains, was not recognized in the allocation formula based on net acre-feet. It argues that high withdrawal pressure increases ultimate recovery from water drive reservoirs, such as the J2RF, although it admitted it was unable to quantify the recovery.

In response to a question about the early watering out, Texaco stated that the life of A–11 was not abnormally short and that the order of watering out in the J2RF was Exxon's A–24, Texaco's A–11, Shell's B–22, Shell's B–13A, and Shell's B–24ST. These wells went off production relative to their order from the west, the direction from which the water drive was coming.

Texaco admitted that it was overproduced based on the net acre-feet formula, Shell underproduced, and Exxon was about even. Lease production showed Texaco at 443 percent, Exxon Block 314 at 136 percent, Exxon Block 332 at 53 percent, and Shell at 72 percent.

Based on an allocation formula using 50 percent for net acre-feet and 50 percent for productivity, Texaco would be allocated 15.8 percent of the unit production, rather than 3.97 percent; Shell would receive 48.8 percent, instead of 59.5 percent; and Exxon would receive 35.4 percent instead of 36.5 percent.

Texaco concluded its argument with the following comments:

> [A] productivity factor is appropriate here because the high productivity rate is indicative of a special completion technique which resulted in increased hydrocarbon reserve recovery in this partial water drive reservoir and thereby aided ultimate recovery.
>
> Secondly, and these are pointed out in our brief, the high productivity rate of the A–11 well eliminated the drilling of additional wells into the reservoir since the A–11 well produced at almost

three times the rate of the average unit wells. Therefore, in order to accomplish the higher reservoir production rate made possible by the A–11 well, two or three additional wells would have been necessary.

Thirdly, the A–11 well has accomplished prompt and efficient development of the reservoir which would not have otherwise occurred. All consistent with the national interest, the urgency of the production of gas, consistent with the Secretary of Interior's urging to maximize production of hydrocarbons promptly and efficiently, and consistent with the mandates contained in section 102, paragraphs 2 and 3 of the OCS Lands Act Amendments of 1978.

The failure to recognize productivity here as an equity as a part of the formula could have an adverse impact on OCS operations in connection with such matters as acting as a disincentive to future high volume completions. Secondly, discourage work overs. Third, cause operators to recomplete in other zones after they obtained their equity in the reservoir.

(Tr. 23.)

At oral argument, Gulf stated that there was sufficient data prior to its drilling A–11 to assure production from a well into the J2RF. Drilling was undertaken to protect correlative rights and keep Exxon and Shell from draining the tract. Gulf alleged that neither Texaco nor Gulf had any idea that the J2RF would be unitized, nor that if it were, the participation formula would be strictly on a net acre-foot basis. In Gulf's view, OCS Order No. 11 required Texaco-Gulf to drill a producing or producible well in order to join the unit. If the J2RF were to be unitized, it was expected GS would develop a formula consistent with the benefits of the well. Texaco's contention that a high rate of production is an advantage to total recovery was reiterated by Gulf.

Gulf argued that the net acre-feet formula is appropriate if no preunit production has occurred, but after substantial production from the reservoir before unitization is accomplished, use of original net acre-feet is not an equitable basis for allocation. It further argued that the aggressive drilling program of Texaco-Gulf should be recognized. Exxon commenced its first production from the J2RF some 36 months after its first lease issued. Shell commenced its production from J2RF some 59 months after its lease issued. Texaco-Gulf, however, achieved production in only 31 months. After production commenced from the A–11 well, Texaco-Gulf overproduced. With only 4 percent of the J2RF reserves, the A–11 produced 24 percent of reservoir yield. Shell, on the other hand, with 59.5 percent of the reserves, produced only 40 percent of the reservoir yield. That rate of production, Gulf maintains, suggests a superior sand condition for the A–11, which should be recognized in the allocation formula. In support thereof, Gulf points to the Vermilion Block 320 allocation formula utilizing productivity as a factor in the allocation of production. If the Vermilion 320 formula were applied according to Gulf, Texaco-Gulf would receive 8 percent of the J2RF production.

Gulf reiterated the A–11 was drilled to protect correlative rights, not to participate in a unit. There are only two ways to get production, drill a well or join a unit. Under OCS Order No. 11, a lease cannot enter a unit agreement without a producing or producible well.

Counsel for Shell noted that there are eight approved unit agreements in the Eugene 330 field, all utilizing net acre-feet as the basis for allocation of production, and that Texaco-Gulf are participants in four of these units in addition to J2RF (Tr. 48). As evidence of its widespread use, Shell states that the model unit agreement provided by GS uses net acre-feet as its allocation standard, although GS may approve variants at the request of unit members (Tr. 47). Production from a unit will invariably be over or under the allocation formula for any lessee (Tr. 48).

In Shell's view, completions adequate to drain the reservoir were in place, and 4½-inch tubing was unnecessary. There is no evidence, counsel maintains, that ultimate recovery of gas from the reservoir will be greater because of the use of such oversized tubing. Fast withdrawal of gas may lead to fingering and loss of the resource in such areas (Tr. 50).

Exxon's A–4A and A–13 wells have produced more gas than A–11, and given the fact that the water flood drive invades J2RF from the southwest, the Exxon wells A–4A and A–13 will probably be the longest-lived wells in the reservoir and ultimately the greatest producers by a large margin. As production had been achieved in the J2RF prior to the drilling of A–11, this is not a case, Shell contended, where any reward for early production is appropriate (Tr. 52).

In conclusion, Shell considered most important the Conservation Manager's authority and right to be considered the final decisionmaker, the generalized use of net acre-feet with some presumption attaching, and the lack of any special characteristics in A–11 which entitle it to special consideration (Tr. 54).

Lastly, Exxon argued that the Conservation Manager acted reasonably in ordering unit participation based on original net acre-feet. Where, as in J2RF, there is adequate information to make a reasonably accurate acre-foot determination, a formula based on net acre-feet is the proper method for allocation of production (Tr. 57). The net acre-foot formula, Exxon maintains, has been used by GS in all OCS units, including several compulsory units. The GS model unit agreement provides for allocation of production on the basis of equivalent net acre-feet (Tr. 58).

High production from a well drilled after those of other unit members, Exxon contends, would require the earlier lessees to drill more wells unnecessarily (Tr. 61). Unitization based on a net acre-foot formula, however, conserves the number of wells, usually to the number that will economically

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drain the reservoir (Tr. 62). The cost of drilling a well should not have any bearing on allocation from a competitive reservoir (Tr. 60).

In their pleadings before the Board, Texaco and Gulf have argued that the allocation formula approved for the Sun-Shell unit agreement involving the "P Sands" underlying Vermilion Blocks 320 and 321 is precedential and should be followed here. We believe the facts surrounding the Sun-Shell unit are distinguishable from those presented in this case.

In Feb. 1971, lease OCS–G 2087 was issued to Sun for Vermilion Block 320, and lease OCS–G 2088 was issued to Shell for Vermilion Block 321. Shortly thereafter, under a joint drilling agreement, two exploratory wells were drilled on the border between the two leases. Each company then drilled additional exploratory wells within its own lease. Drilling and production platforms were erected on each lease by autumn of 1972. Sun commenced drilling its development wells in Nov. 1972, completing its program in Nov. 1973. Commencement of Shell's development program was delayed until Apr. 1973. OCS Order No. 11 was issued May 1, 1974.

Before either lease was producing, Shell requested a determination that the "P Sands" were competitive. Sun commenced production in Nov. 1974 from five drainage points through three wells. The Conservation Manager, on May 2, 1975, issued his final determination that the "P Sands" were competitive. Shell then terminated its drilling program with four completed single wells into the "P Sands" and on July 13, 1975, requested the Conservation Manager to order unitization of the "P Sands" in Blocks 320 and 321. The Conservation Manager, by decision of Nov. 10, 1975, ordered the unitization of the "P Sands" in Blocks 320 and 321. Neither party could agree to the terms of the proposed unit agreement, so on Mar. 23, 1977, the Conservation Manager submitted a form of unit agreement, retroactively effective Nov. 14, 1975, to Sun and to Shell with orders that each execute the agreement within 30 days. The unit agreement was executed by both parties on May 9, 1977.

It was determined that of the original productive volume in the "P Sands" reservoir, 81.1 percent underlay the Shell lease, and 18.9 percent underlay the Sun lease. During the period from Jan. 1, to June 30, 1976, while Sun and Shell were expected to negotiate a unit agreement, Sun's wells produced 54.9 percent of total reservoir production, and Shell's wells 45.1 percent. The Conservation Manager considered these figures to be representative of the reservoir production, as all wells developed by the lessees were producing. A comparison between the original reserves and the actual production showed that Shell underproduced by 36 percent in relation to the original reserves underlying its lease,

while Sun overproduced by 36 percent. The Conservation Manager assigned a weighting factor of 0.36 to current production and a weighting factor of 1–0.36 to the original reserves. Using this formula, 68.14 percent of unit production was allocated to the Shell lease, and 31.86 percent to the Sun lease.

While it would have been economical for Shell to have drilled 7 more wells in 1975, 13 additional wells would have been required for Shell to offset fully the drainage of reserves underlying its lease. As the existing wells were adequate to drain the reservoir efficiently, the Conservation Manager in the interest of conservation, adopted his formula above set forth, allocating ultimately to Sun a share of production equal to more than double the original reserves underlying its lease, an adequate reward to Sun's earlier drilling program.

In the J2RF sand unit, the original productive net acre-feet attributed to the Texaco lease was 3.97380 percent of the total, to Shell 59.52776 percent, and to Exxon 36.49844 percent. Surface acres of the Texaco lease within the J2RF sand unit are 62.04 acres, or 2.843 percent of the total. Development of the reservoir had been achieved by Exxon with five wells and by Shell with seven wells before the Texaco well went into production. Thus, the Vermilion precedent is distinguishable, as the position of Texaco in the J2RF unit cannot be equated to that of Sun in the Vermilion 320 "P Sand."

From the record it appears uncontrovertible that the extraordinarily high production from the A–11 well was due, in large part, to the oversized tubing employed in the well. Nothing in the record supports the allegation of Texaco that a superior sand condition existed on its lease within the J2RF. Accordingly, we must find that denial of productive capacity as an equity factor in the allocation of production from J2RF was not an abuse of discretion or an arbitrary and capricious act by the Conservation Manager.

It is also uncontroverted that the J2RF is a competitive reservoir as to the four leases and that Texaco had to drill the A–11 well to protect its correlative rights in the J2RF, in light of the existing wells of Exxon and Shell which probably were draining gas from the Texaco leasehold. It seems clear, however, that knowledge of the perimeter of J2RF and the geological character of the reservoir was available to Texaco prior to the time it drilled the A–11 well, as well as knowledge of the limited area of J2RF underlying the Texaco lease. It is without cavil that the A–11 well was drilled solely to protect the correlative rights of Texaco in the J2RF. After A–11 went into production, Exxon and Shell would each have been prudent to have drilled an additional well to offset A–11, although it appears that the existing wells were then adequate to deplete the J2RF. The A–11 well was the last well drilled into the J2RF. To fore-

stall the need for drilling any additional wells into the J2RF, the Conservation Manager directed unitization of J2RF, an action within his properly delegated authority and consonant with the principles enunciated in OCSLA.

It is a undeniable that the decision of a lessee to drill a well is purely a business decision and that the risks of a nonprofitable venture must be faced by the lessee alone. Thus, if the lessee does not recoup its costs because of a nonprofitable well, it has no recourse. Similarly, where a well is drilled into a competitive reservoir, for which a unit agreement is later created with allocation of production based on the original productive net acre-feet, the operator of such a well cannot be heard to complain that it has been short-changed because its well overproduces beyond the allocated resource underlying its lease and that it must, under the unit agreement, share the greater part of its production with the other members of the unit agreement.

It has not been suggested by anyone that the prolific production from A–11 came only from the J2RF underlying the Texaco lease. Nor has it been shown that Texaco has been injured to its detriment because of earlier production from J2RF by Exxon and Shell with consequent drainage from the Texaco leasehold, where Texaco did receive the equivalent of the gas produced from the productive net acre-feet of gas-bearing sand in J2RF underlying its leasehold prior to production from the reservoir. It must be pointed out that appellants admitted that the increase in cost attributable to the use of 4½-inch tubing as opposed to more standard sizes was "virtually insignificant" in relation to the total cost of the well.

Moreover, we note that while Texaco and Gulf both argued that they had, in some degree, increased the total unit production from the reservoir through use of 4½-inch tubing (a contention denied by appellants), they admitted that such an increase was incapable of quantification. While we recognize the difficulties inherent in any attempt to so quantify, we think it equally obvious that absent a determined relationship between the 4½-inch tubing and total recovery, appellants' method of allocating production, viz., 50 percent net acre-feet and 50 percent current productivity, is inherently arbitrary. Without an established quantified benefit there is no reasonable basis to choose between a 50/50, a 90/10, or a 10/90 basis of allocation. While appellants have criticized the GS allocation as clearly erroneous, it is demonstrably apparent that the allocation which they advocate is, itself, intrinsically flawed given the facts presently available.

We recognize that situations will arise in which recourse to a net acre-foot allocation will not fairly treat all unit participants. We hold, however, that where an individual seeks to force GS to utilize a method of allocation other than

net acre-feet, it is the obligation of the individual to clearly establish the superiority of its method of allocation given the specific factual milieu of each unitization. This has not been done here.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

EDWARD W. STUEBING
Administrative Judge

EFFECT OF THE CRUDE OIL WINDFALL PROFIT TAX ACT OF 1980 ON THE STATES' SHARE OF FEDERAL OIL ROYALTIES

M–36929

December 30, 1980

Mineral Leasing Act: Royalties—Oil and Gas Leases: Royalties

The Crude Oil Windfall Profit Tax Act, P.L. 96–223, 94 Stat. 229 (1980) imposes the windfall profit tax on Federal oil royalty revenue. The states have no economic interest, as that phrase is used in the Windfall Profit Tax Act, in Federal royalty revenue that would exempt their share from taxation. Moreover, revenue from the windfall profit tax cannot be treated as royalty revenue and be distributed to the states under sec. 35 of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 191 (1976). Accordingly, the states' share of Federal oil royalties must be based upon after-tax royalty revenue.

To: Secretary
From: Solicitor
Subject: Effect of the Crude Oil Windfall Profit Tax Act of 1980 on the States' Share of Federal Oil Royalties

This memorandum explains the legal basis of our prior, informal conclusions regarding the effect of the Crude Oil Windfall Profit Tax Act (the "Act"), Pub. L. No. 96–223, 94 Stat. 229 (1980), on the states' share of federal oil royalties. Although the Act exempts oil in which states hold an economic interest, it imposes the windfall profit tax on the federal economic interest in oil royalties. We conclude that the states have no economic interest, as that phrase is used by the Act, in federal royalty revenue that would exempt their share from taxation. Moreover, revenue from the windfall profit tax cannot be treated as royalty revenue and be distributed to the states under the provisions of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* Thus, as the Act's legislative history confirms, the states' share of federal oil royalties must be based upon after-tax royalty revenue.

The Act reduces, by the amount of the excise tax, the additional revenue the Federal Government, and in turn the states, will receive

from the price increases produced by decontrol. Recently, the U.S. Geological Survey estimated that the windfall profit tax will take a steadily greater portion from Wyoming's share of federal royalties, from $25 million in Fiscal Year 1981, to $39.3 million in Fiscal Year 1985. Yet despite declining production throughout the period, the Survey estimates that Wyoming's share of after-tax royalty revenue will increase from $101.2 million in Fiscal Year 1981 to $156.8 million in Fiscal Year 1985.

I. THE CRUDE OIL WINDFALL PROFIT TAX ACT AND THE DISPOSITION OF FEDERAL ROYALTY REVENUE UNDER THE MINERAL LEASING ACT

The Crude Oil Windfall Profit Tax Act imposes an excise tax on the increased revenues that will result from the scheduled decontrol of domestic crude oil prices. The Act taxes all domestic oil other than "exempt oil". The Act identifies four categories of exempt oil, which comprise the sole exemptions from the windfall profit tax. *See* sec. 4996(g). The first category exempts "any crude oil from a qualified governmental interest." Secs. 4991 (a), (b). Sec. 4994(a) defines a qualified governmental interest as "an economic interest in crude oil" held by a State or one of its political subdivisions. Accordingly, the Act exempts oil in which a state holds an economic interest, but taxes oil in which the Federal Government owns an economic interest.

The states derive their share in federal royalty revenue from sec. 35 of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 191. Sec. 35 provides a formula for the distribution of federal royalty payments after their receipt:

> **All money received from * * * royalties * * * shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury * * * to the State * * * within the boundaries of which the leased lands or deposits are or were located.**

The Windfall Profit Tax Act and the Mineral Leasing Act relate in two ways that possibly could allow the State's share to be calculated on the basis of pre-tax federal royalty revenue. The first way is the meaning of "economic interest" as used in the Windfall Profit Tax Act. If sec. 35 grants states an economic interest, within the meaning of the Act, in the royalty share of crude oil produced from federal leases, then the states' share will be exempt under the Act and will be calculated from pre-tax royalty revenue. The second way is the treatment of windfall profit tax revenue under the Mineral Leasing Act. If Congress intended the revenue attributable to the excise tax on federal royalties to be treated as royalty revenue and distributed under the sec. 35 formula, then the states' share should be based on pre-tax revenue. Otherwise, the states' share must be calculated from after-tax federal royalty revenue.

A. The Meaning Of "Economic Interest" As Used by The Windfall Profit Tax Act

The legislative history of the Act indicates that Congress intended the phrase "economic interest" to mean what it does under Federal income tax law. The Senate Report states "[w]hether a particular taxpayer owns an economic interest in oil is determined under the same rules that apply for Federal income tax purposes." Sen. Rept. No. 96–394, Nov. 1, 1979 (H.R. 3919), p. 60. The concept of an economic interest in a mineral deposit as well established in Federal income tax law in the context of the depletion allowance and the distinction between ordinary income and capital gains. *See Rutledge* v. *United States*, 428 F.2d 347, 351 (5th Cir. 1970). In *Palmer* v. *Bender*, 287 U.S. 551 (1933), the United States Supreme Court enunciated the principles that since have consistently been applied to determine whether an entity has an economic interest in a mineral deposit. The depletion deduction is allowed only to one who "has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of oil, to which he must look for a return of his capital." 287 U.S. 557. These two factors are the elements of an economic interest. *Commissioner* v. *Southwest Exploration Co.*, 350 U.S. 308, 314 (1956). *See Parsons* v. *Smith*, 359 U.S. 215 (1959) and cases cited therein at 221, n. 7.

The Treasury regulations also discuss what constitutes an economic interest in a mineral deposit. 26 CFR 1.611–1(b)(1) states that:

> A person who has no capital investment in the mineral deposit * * * does not possess an economic interest merely because through a contractual relation he possesses a mere economic or pecuniary advantage derived from production. For example, an agreement between the owner of an economic interest and another entitling the latter to purchase or process the product upon production or entitling the latter to compensation for extraction or cutting does not convey a depletable economic interest.

See Paragon Coal Co. v. *Commissioner*, 330 U.S. 624, 635–36 (stating that this regulation, which survived through successive amendments of the Internal Revenue Code, is entitled to great weight). The Temporary Excise Tax Regulations promulgated pursuant to the Act track the regulations pertaining to the depletion allowance. The Act provides that the producers of crude oil pay the windfall profit tax. Sec. 4986(b). The excise tax regulations define "producer" as "the holder of the economic interest with respect to the crude oil in place in the ground." 45 F.R. 23395 (Apr. 4, 1980).

From the cases applying the definition of an economic interest developed by the Supreme Court and adopted by the Treasury regulations, a clear pattern has emerged. With rare exceptions, the person

found to own an economic interest is within the chain of title of a leasehold or fee interest. A lessor who has reserved royalties retains an economic interest in the oil necessary for the satisfaction of the royalties. *Kirby Petroleum Co.* v. *Commissioner*, 326 U.S. 599, 604 n. 6. But shareholders of corporations owning mineral deposits, *Helvering* v. *O'Donnell*, 303 U.S. 370 (1938); miners who have contracted to operate a mine, *Paragon Jewel Coal Co.* v. *Commissioner*, 380 U.S. 624 (1965), *Parsons* v. *Smith*, 359 U.S. 215 (1959); purchasers of the mineral, *Filtrol Corp.* v. *United States*, 487 F. 2d 536 (Ct. Cl. 1973), *CBN Corp* v. *United States*, 364 F. 2d 393 (Ct. Cl. 1966); and processors of the mineral, *Helvering* v. *Bankline Oil Co.*, 303 U.S. 362 (1938), *Utah Salt Co.* v. *Wise*, 370 F. 2d 976 (10th Cir. 1967); have no economic interests in the mineral deposits.

Nonetheless, the Supreme Court has stated that title to oil in place is not determinative of economic interest. *Kirby Petroleum Co.* v. *Commissioner*, 326 U.S. at 604. If an entity's relationship to the mineral property is sufficiently close, the exceptional case may recognize that the entity holds an economic interest in the minerals even though the entity does not hold normally recognized property rights. Important factors include the entity's control over the property and the extraction and marketing processes, the degree of exclusivity of the entity's interest, and the duration of the interest. P. Irwin, "Selected Current Tax Problems of Oil and Gas", *Nineteenth Annual Institute On Oil and Gas Laws*, 295, 343 (Sw. L. Foundation ed 1968). *See Commissioner* v. *Southwest Exploration Co.*, 350 U.S. 308 (1956) (adjacent owner who had made essential contribution to leasing production by providing the only possible drilling site had an economic interest).

The states' expectation of an economic advantage from federal leases arises solely from sec. 35, 30 U.S.C. § 191, not from their relationship to the mineral deposits. The legislative history of the Mineral Leasing Act of 1920 makes clear that Congress intended the royalty revenue distribution provision to compensate the states for the loss of real estate tax revenues resulting from the continued federal ownership of land in the states. *See* Remarks of Representative Mondell, 58 Cong. Rec. 7772–7774 (1919); *See also* 51 Cong. Rec. 16428–16429 (1914). Congress evinced no intention that sec. 35 convey an interest in the federal mineral properties to the states. The states are not parties to federal leases, nor do they hold property interests in federally owned mineral deposits. The states do not control federally owned minerals or the extraction and marketing of those minerals. States have no pecuniary or legal interest in federally owned oil until that oil is leased, extracted and the royalty payments are made to the federal government. In sum, sec. 35 simply provides for the disposition of federal royalty revenue: it does not confer on states an economic interest in the oil in place

within the meaning of the Windfall Profit Tax Act.

B. Treatment Of Windfall Profit Tax Revenues Under The Distribution Provision Of The Mineral Leasing Act

Sec. 35 of the Mineral Leasing Act specifically provides for the sharing of "money received from * * * royalties." Money paid into the Treasury pursuant to the Crude Oil Windfall Profits Tax Act is not "money received from * * * royalties", but instead is tax revenue. Whether the windfall profit tax is paid to the U.S. Geological Survey depends upon the Treasury Department rules. Even if it is paid to the Survey, it is received as tax revenue rather than as money from royalty. Consequently, it never becomes subject to the revenue redistribution provisions of the Mineral Leasing Act. Any other result would create anomalous situations. For example in Alaska, where 90% of the royalty receipts are passed to the state, the federal government could be in a position where it would be required to distribute royalties and pay taxes in amounts that would exceed the total economic interest of the United States in the crude oil.

II. CONGRESSIONAL DISCUSSION OF THE WINDFALL PROFIT TAX ACT'S IMPACT ON STATE TREASURIES

Congress clearly understood the effect of taxing federal royalty revenue that otherwise would have been paid to the states under the formula in the Mineral Leasing Act. During the Senate debate on the conference report on H.R. 3919, which became the Windfall Profit Tax Act, Senator Schmitt summarized the legislative history regarding the taxation of federal royalties:

> Under the House bill, Federal royalty oil was subject to the windfall profit tax. On the Senate floor, however, Senator Long added an amendment to H.R. 3919 which exempted all oil production owned by the Federal Government. At the time, Senator Long stated that this exemption involved only a bookkeeping change; it would reduce total windfall profit tax receipts, but it would increase Federal royalty receipts by the same amount.
>
> Senator Long asserted, and I am certain asserted in good faith, that this exemption would involve no revenue loss, since it was merely shifting Federal money from one pocket to another.
>
> As I indicated earlier, and as Senator Long has indicated in his remarks of March 20, when the bill was in conference, he learned that he had been in error in stating that the exemption for Federal royalty oil involved no revenue impact. To avoid any appearance that he had tried to gain an unfair advantage for the States, Senator Long moved that the Senate recede to the House bill on this point.
>
> Senator Long's motion was accepted, as I understand it, without any lengthy discussion. And, accordingly, under the conference report, ***Federal royalty oil is subject to the windfall profit tax and the amount of revenue the States will receive from this source will be reduced accordingly.*** Cong. Rec. S2826 (daily ed. Mar. 21, 1980) (Italics added)

The Joint Explanatory Statement of the Committee of Confer-

ence on H.R. 3919 confirms Senator Schmitt's remarks:

> The conference agreement follows the * * * House bill with respect to oil owned by the Federal government. Cong. Rec. H. 1717 (daily ed. Mar. 10, 1980)

Congress also recognized that the Act would significantly affect state treasuries. During the Senate debate, in response to questions by Senator Schmitt and Senator Wallop, Senator Long noted that the failure to exempt Federal royalty oil from the tax would cost the states $2 billion. He estimated that 49% of this reduction would come from revenues which Wyoming would otherwise have received. Remarks of Senator Long, Cong. Rec. S3030–3031 (daily ed. Mar. 26, 1980). *See generally* remarks of Senators Wallop and Long, Cong. Rec. S2623–2624 (daily ed. Mar. 19, 1980); remarks of Senator Long, Cong. Rec. S2714–2715 (daily ed. Mar. 20 1980); remarks of Senator Schmitt, Cong. Rec. S2825–2827 (daily ed. Mar. 21, 1980); remarks of Senator Long, Cong. Rec. S3030–3031 (daily ed. Mar. 26, 1980).

Senator Long's figures greatly exceed a recent U.S. Geological Survey estimate. The estimated Wyoming mineral revenue data compiled by the Survey indicate that the windfall profit tax will reduce Wyoming's share of federal royalties by $25 million in Fiscal Year 1981; $32 million in Fiscal Year 1982; $35.5 million in Fiscal Year 1983; $37.3 million in Fiscal Year 1984; and $39.3 million in Fiscal Year 1985.

III. CONCLUSION

The Act's legislative history confirms its language: the Act imposes the windfall profit tax on federal oil royalty revenue, and accordingly requires calculation of the states' share of federal royalties upon after-tax royalty revenue. The Act has a substantial impact on state treasuries. Yet the legislative history of the Act makes the conclusion that Congress intended such substantial reduction in the states' share of federal royalties inescapable.

The windfall profit tax, however, reduces only a portion of the additional revenue that the states will receive from the price increases produced by decontrol. According to the U.S. Geological Survey estimate discussed above, production of oil in Wyoming will decline steadily from 68.5 million bbls. in Fiscal Year 1981 to 61.5 million bbls. in Fiscal Year 1985. Nonetheless, Wyoming's share of federal oil royalties will increase throughout that period. After deducting the windfall profit tax from federal oil royality revenue, the Survey estimates that Wyoming will receive $101.2 million in Fiscal Year 1981, $128 million in Fiscal Year 1982, $140.6 million in Fiscal Year 1983, $149.2 million in Fiscal Year 1984, and $156.8 million in Fiscal Year 1985. Thus, by 1985 Wyoming will enjoy a 50% increase in its share of federal royalty revenue.

CLYDE O. MARTZ
Solicitor

December 30, 1980

Wyoming Mineral Royalty Revenues

(Data in millions)

Production period	Commodity	Estimated production	Estimated value/unit	Estimated gross value	Average royalty (percent)	Estimated total royalty revenue	50 percent to State of Wyoming
Oct. 1980 thru Mar. 1981	Oil	[1] 34.5	[1] $27.00	$931.5	12.5	$116.5	$58.2
	Gas	[2] 150.0	[2] 1.50	225.0	12.5	28.1	14.0
	Coal	[3] 22.0	[3] 9.50	209.0	2.6	5.5	2.8
	Sodium	[3] 1.3	[3] 68.00	86.0	5.0	4.3	2.2
	Others:						
	W.P. tax					(23.0)	(11.5)
	Rents and bonuses			6.0			3.0
	Total—1st payment, FY 1981						68.7
Apr. 1981 thru Sep. 1981	Oil	[1] 34.0	[1] $32.00	$1,088.0	12.5	$136.0	$68.0
	Gas	[2] 155.0	[2] 1.65	255.8	12.5	32.0	16.0
	Coal	[3] 25.0	[3] 10.00	250.0	2.5	6.5	3.3
	Sodium	[3] 1.3	[3] 68.00	90.0	5.0	4.5	2.2
	Others:						
	W.P. tax					(27.0)	(13.5)
	Rents and bonuses			6.0			3.0
	Total—2nd payment, FY 1981						79.0
Oct. 1981 thru Mar. 1982	Oil	[1] 33.5	[1] $37.00	$1,239.5	12.5	$155.0	$77.5
	Gas	[2] 160.0	[2] 1.80	288.0	12.5	36.0	18.0
	Coal	[3] 27.0	[3] 11.00	297.0	2.7	8.1	4.0
	Sodium	[3] 1.3	[3] 69.00	92.0	5.0	4.6	2.3
	Others:						
	W.P. tax					(31.0)	(15.5)
	Rents and bonuses			6.0			3.0
	Total—1st payment, FY 1982						89.3
Apr. 1982 thru Sep. 1982	Oil	[1] 33.0	[1] $40.00	$1,320.0	12.5	$165.0	$82.5
	Gas	[2] 165.0	[2] 1.95	321.8	12.5	40.2	20.1
	Coal	[3] 30.0	[3] 11.00	330.0	2.7	9.0	4.5
	Sodium	[3] 1.4	[3] 69.00	94.0	5.0	4.7	2.3
	Others:						
	W.P. tax					(33.0)	(16.5)
	Rents and bonuses			6.0			3.0
	Total—2nd payment FY 1982						95.9

See footnotes at end of table.

Wyoming Mineral Royalty Revenues—Continued

(Data in millions)

Production period	Commodity	Estimated production	Estimated value/unit	Estimated gross value	Average royalty (percent)	Estimated total royalty revenue	50 percent to State of Wyoming
Oct. 1982 thru Mar. 1983.	Oil	[1] 33.0	[1] $42.00	$1,386.0	12.5	$173.2	$86.6
	Gas	[2] 170.0	[2] 2.10	357.0	12.5	45.0	22.5
	Coal	[3] 31.0	[3] 12.00	372.0	2.7	10.2	5.1
	Sodium	[3] 1.4	[3] 69.00	97.0	5.0	4.8	2.4
	Others:						
	W.P. tax					(35.0)	(17.5)
	Rents and bonuses			6.0			3.0
Total—1st Payment, FY 1983							102.1
Apr. 1983 thru Sep. 1983.	Oil	[1] 32.5	[1] $44.00	$1,430.0	12.5	$179.0	$89.5
	Gas	[2] 175.0	[2] 2.25	393.8	12.5	49.2	24.6
	Coal	[3] 33.0	[3] 12.00	396.0	2.8	11.2	5.6
	Sodium	[3] 1.6	[3] 70.00	112.0	5.0	5.6	2.8
	Others:						
	W.P. tax					(36.0)	(18.0)
	Rents and bonuses			6.0			3.0
Total—2nd Payment, FY 1983							107.5
Oct. 1983 thru Mar. 1984.	Oil	[1] 32.0	[1] $46.00	$1,472.0	12.5	$184.0	$92.0
	Gas	[2] 180.0	[2] 2.40	432.0	12.5	54.0	27.0
	Coal	[3] 35.0	[3] 13.00	455.0	2.8	12.6	6.3
	Sodium	[3] 1.7	[3] 71.00	120.7	5.0	6.1	3.0
	Others:						
	W.P. tax					(36.8)	(18.4)
	Rents and bonuses			6.0			3.0
Total—1st payment, FY 1984							112.9
Apr. 1984 thru Sep. 1984.	Oil	[1] 31.5	[1] $48.00	$1,512.0	12.5	$189.0	$94.5
	Gas	[2] 185.0	[2] 2.55	471.8	12.5	59.0	29.5
	Coal	[3] 37.0	[3] 13.00	481.0	2.8	13.3	6.6
	Sodium	[3] 1.8	[3] 71.00	127.8	5.0	6.4	3.2
	Others:						
	W.P. tax					(37.8)	(18.9)
	Rents and bonuses			6.0			3.0
Total—2nd payment, FY 1984							117.9
Oct. 1984 thru Mar. 1985.	Oil	[1] 31.00	[1] $50.00	$1,550.0	12.5	$193.8	$96.9
	Gas	[2] 190.0	[2] 2.70	513.0	12.5	64.1	32.0
	Coal	[3] 39.0	[3] 14.00	546.0	5.5	30.0	15.0
	Sodium	[3] 1.8	[3] 72.00	129.6	5.0	6.5	3.3
	Others:						
	W.P. tax					(38.8)	(19.4)
	Rents and bonuses			6.0			3.0
Total—1st payment, FY 1985							130.8

See footnotes at end of table.

Wyoming Mineral Royalty Revenues—Continued

(Data in millions)

Production period	Commodity	Estimated production	Estimated value/unit	Estimated gross value	Average royalty (percent)	Estimated total royalty revenue	50 percent to State of Wyoming
Apr. 1985 thru Sep. 1985	Oil	[1] 30.5	[1] $52.00	$1,586.0	12.5	$198.3	$99.2
	Gas	[2] 195.0	[2] 2.85	555.8	12.5	69.5	34.8
	Coal	[3] 41.0	[3] 14.00	574.0	5.5	31.6	15.8
	Sodium	[3] 1.9	[3] 72.00	136.8	5.0	6.8	3.4
	Others:						
	W.P. tax					(39.7)	(19.9)
	Rents and bonuses			6.0			3.0
Total—2nd payment, FY 1985							136.3

NOTE: Rents and bonuses corrected 10/27/80.
[1] Per barrel.
[2] In millions cubic feet.
Per ton.

FALCON COAL CO., INC.

2 IBSMA 406

Decided *December 31, 1980*

Appeal by the Office of Surface Mining Reclamation and Enforcement from a May 15, 1980, decision by Administrative Law Judge David Torbett vacating Notice of Violation No. 79–2–61–29 (Docket No. NX 0–77–R) and the civil penalty assessment (Docket No. NX 0–65–P) on the basis of lack of jurisdiction over the Falcon Coal Company operation.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." A coal loading facility operated and controlled by the same company that owns and operates the mines supplying coal to it is being conducted "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." Where a coal loading facility is found to be operated in connection with several neighboring coal mines but is 11.2 miles distant from the closest of those mines, the facility may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5.

APPEARANCES: Randall S. May, Esq., Craft, Barret & Haynes, Hazard, Kentucky, for Falcon Coal Company, Inc.; Carol S. Nickle, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Marianne D. O'Brien, Esq., and Marcus P. McGraw, Esq., Assistant Solici-

tor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has sought review of a decision of Administrative Law Judge David Torbett vacating Notice of Violation No. 79–2–61–29, issued to Falcon Coal Co., Inc. (Falcon), pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act),[1] and citing three violations of the initial program regulations. For the reasons discussed below, we reverse that decision.

Background

On Dec. 11, 1979, OSM inspected Falcon's Haddix Continuous Loading Facility in Breathitt County, Kentucky, and issued Notice of Violation No. 79–2–61–29. The notice charged three violations: Violation 1, for allegedly failing to post site identification signs as required by 30 CFR 715.12(c); and violations 2 and 3, for allegedly failing to pass all surface drainage through a sedimentation pond or series of sedimentation ponds, and allegedly failing to meet effluent limitations, both in violation of 30 CFR 715.17(a). A proposed assessment of a civil penalty was subsequently issued by OSM.[2]

On Jan. 14, 1980, Falcon filed an application for review of the notice (Docket No. NX 0–77–R), pursuant to sec. 525 of the Act (30 U.S.C. § 1275 (Supp. II 1978)). On Feb. 8, 1980, Falcon filed a petition for review of the proposed civil penalty assessment pursuant to sec. 518 of the Act (30 U.S.C. § 1268 (Supp. II 1978)) (Docket No. NX 0–65–P). The application and petition were consolidated for a hearing, which was conducted on Apr. 30, 1980, in London, Kentucky.

The sole issue litigated at the hearing was whether OSM had jurisdiction over Falcon's Haddix Continuous Loading Facility. Pending the decision on the jurisdictional question, the parties agreed that (1) all three violations occurred; (2) violations 2 and 3 would be combined into one violation; and (3) the total civil penalty would be $2,500 (Tr. 6). At the conclusion of OSM's presentation of its case, Falcon moved to vacate the notice of violation arguing that OSM failed to show that coal processing plants were subject to the Act and, therefore, OSM lacked jurisdiction over Falcon's facility. The Administrative Law Judge granted the motion and ordered that the notice of violation and proposed civil penalty

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. § 1271(a)(3) (Supp. II 1978).

[2] On Jan. 17, 1980, Falcon received a notice of proposed assessment for Notice of Violation No. 79–2–61–29. The penalties assessed by OSM were as follows: Violation 1, $480; violation 2, $2,800; violation 3, $2,800. Total: $6,080.

assessment be vacated. On May 15, 1980, he issued a written confirmation of his oral decision. On June 16, 1980, OSM filed a timely notice of appeal.

The following facts are undisputed by the parties. The Continental Illinois Leasing Corp. (C.I.L.C.), owns the Haddix Continuous Loading Facility and leases it to Falcon. As part of a coal purchase agreement, Falcon operates the facility and the lease rental payments are made to C.I.L.C. by the Tennessee Valley Authority (TVA). The activities conducted at the plant are limited to the loading and crushing of coal (Answers to Interrogatory No. 7). The operations at the facility began in May 1973 and are permitted by the Commonwealth of Kentucky.

As of the date of OSM's inspection, all coal hauled to the facility came from mines owned and operated by Falcon in Breathitt County, Kentucky (Tr. 14). The nearest minesite is 11.2 miles from the loading facility (Tr. 18, 19); the farthest, 18 miles (Answer to Interrogatory No. 10). The facility has no physical connection with, nor is it adjacent to, any minesite or mining operation of the applicant (Tr. 19, 20). The facility is used solely in connection with coal to be delivered to TVA under the coal purchase contract between TVA and Falcon.

Discussion

In *Drummond Coal Co.*, 2 IBSMA 96, 101, 87 I.D. 196, 198 (1980), we stated a two-part test for determining whether a coal processing or loading facility constitutes "surface coal mining operations" within the meaning of the term in 30 CFR 700.5.[3] The facility must be operated "in connection with" a mine and be located "at or near the minesite." OSM argues that the facts of the instant case meet the two tests and that *Drummond* is dispositive of the issue because the activities at Falcon's facility and its surface mines are one common operation. Although not exactly like those in *Drummond*, the facts here lead us to only a very small variation of our holding there. That is also entirely consistent with our holding in the similar case of *Bethlehem Mines Corp.*, 2 IBSMA 215, 87 I.D. 380 (1980).

In *Drummond*, the Board concluded that where a coal processing facility is owned by the same company that owns the mines that supply coal to it, that facility may conduct activities "in connection with" a surface coal mine within the meaning of 30 CFR 700.5. We did note, however, that there may be "other

[3] 30 CFR 700.5 reads in pertinent part:
"*Surface coal mining operations* means—
"(a) *Activities conducted* on the surface of lands *in connection with a surface coal mine* or, subject to the requirements of Section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce *at or near the mine-site.*" (Italics added.)

relationships" that would suffice to establish a "connection" between an activity and a surface coal mine. *Drummond*, 2 IBSMA at 101, 87 I.D. at 198.

Among other such relationships that may exist, the Board has recognized that "[a] contract, lease, or sell-back arrangement * * * may be sufficient to establish a connection between a coal mine and a processing facility," but the nature of the arrangement must be proved. *Virginia Iron, Coal and Coke Co.*, 2 IBSMA 165, 171, 87 I.D. 327, 330 (1980).

Such an arrangement was established by OSM in *Bethlehem Mines Corp.* In that case the land on which the tipple was located was owned by a railroad and leased to Bethlehem. The facility was operated by a third party under contract with Bethlehem. In the year immediately preceding the issuance of the notice of violation, approximately 95 percent of the coal loaded through the facility came from Bethlehem's mine. The situation is nearly identical with that in this case, with the exception that the operation of the facility in *Bethlehem* was by a third party. Although the facility was neither owned nor operated by Bethlehem, as was the case in *Drummond*, Bethlehem controled the facility through its lease from the railroad and contract with the third party. Such control, the Board concluded, combined with Bethlehem's use of the facility to load coal from its own mine was "sufficient to establish that the facility [was] operated in connection with [the] mine within the meaning of 30 CFR 700.5." *Bethlehem*, 2 IBSMA at 220, 87 I.D. at 382.

[1] As noted, there is a similarity between the facts in *Bethlehem* and those in the instant case. That similarity coupled with the "other relationships" (*Drummond*, 2 IBSMA at 101, 87 I.D. at 198), namely the operation of the facility by Falcon, leads the Board to conclude that the loading facility is operated "in connection with" Falcon's coal mines as contemplated under 30 CFR 700.5.

[2] Falcon's facility is also located "at or near the minesite." The Board held in *Drummond* that a processing facility, 9 to 30 miles from functionally integrated and commonly owned mines supplying it, was "near" those mines within the meaning of 30 CFR 700.5. Here, the mines are similarly related and owned and are from 11.2 to 18 miles from the loading facility. The loading facility is, therefore, "near" the minesites within the meaning of "surface coal mining operations" in 30 CFR 700.5.

The decision of the Hearings Division vacating Notice of Violation No. 79-2-61-29 is reversed, and a civil penalty of $2,500, as agreed upon to by the parties, is assessed.

MELVIN J. MIRKIN
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

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